Supreme Court, U.S.
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In The
Supreme Court of the United States

WELDON ANGELOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's summary disposition in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*), stands as a precedential bar to a lower court otherwise concluding that a sentence violates the Eighth Amendment's ban on cruel and unusual punishment under the *Solem-Harmelin* analysis articulated after *Davis* and in opinions of the Court rendered after plenary review, full briefing, and oral argument.

2. Whether it violates the Eighth Amendment to impose a mandatory 55-year sentence on a first-time offender for possessing firearms in connection with selling small amounts of marijuana, where no violence or injury was caused or threatened, where far more serious federal offenses would receive lesser punishment, and where no other jurisdiction would impose such a severe sentence.

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OPINIONS BELOW

The Tenth Circuit opinion is reported at 433 F.3d 738 and reprinted in the Appendix hereto ("App.") at App. 1. That opinion affirmed the Memorandum Opinion and Order of the District Court for the District of Utah, which is reported at 345 F. Supp. 2d 1227 and reprinted at App. 30.

JURISDICTION

The judgment of the appellate panel was entered on January 9, 2006. App. 3. A timely petition for rehearing and rehearing *en banc* was denied on April 4, 2006. *Id.* at 103. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment and 18 U.S.C. § 924(c) are set forth at App. 104.

INTRODUCTION

Petitioner Weldon Angelos, a first-time offender, was sentenced to 55 years and one day – effectively a life sentence, *see* App. 52, 74 – for possessing firearms in connection with selling small amounts of marijuana. Angelos never brandished or used the handguns in his possession, nor did he cause or threaten any violence or injury. Every participant in the trial – the District Court judge, the jury, and, at least initially, the prosecution – recognized that the crimes at issue did not justify life imprisonment. *See* App. 32-38, 56-61, 82 (noting, *inter alia*, government plea offer, sentencing recommendation by jurors, and views of the District Court). Nonetheless, the lower courts rejected Angelos's challenges to his sentence.

The draconian punishment in this case is a result of 18 U.S.C. § 924(c), one of the so-called "mandatory minimum" sentencing laws. According to the courts below, § 924(c) prescribes a 5-year mandatory minimum for a first conviction and a 25-year mandatory minimum for each subsequent

conviction, with the sentences required to run consecutively. *See* App. 29, 37-43. The statute does not distinguish between first-time offenders and recidivists. *See id.* at 70-75. Moreover, the "count stacking" quality of § 924(c) – i.e., the sentence for each conviction must run consecutively – can result in extreme and unjust punishment for *seriatim* "controlled buys" by law enforcement, given that "the additional criminal acts were in some sense procured by the government." *Id.* at 81.

The sentence imposed in this case demonstrates that mandatory minimums are not only ill-advised,[1] but they may also violate the Eighth Amendment under the three-part test of *Solem v. Helm*, 463 U.S. 277 (1983), and *Harmelin v. Michigan*, 501 U.S. 957 (1991), as "unjust, cruel, and even irrational." App. 33, 102. Preventing this conclusion, however, is the Court's *per curiam* decision in *Hutto v. Davis*, 454 U.S. 370 (1982), which, as the District Court noted, is of questionable precedential value but cannot be ignored until the Supreme Court so decides. *See* App. 93-94. This case thus provides the Court with an opportunity to clarify its decision in *Davis*, as well as to address the widespread confusion over the precedential value of summary dispositions on the merits.

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[1] Mandatory minimums have been questioned by many distinguished jurists, including members of this Court. *See* David B. Kopel, *Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety*, CATO POL'Y ANALYSIS, May 17, 1994, at 18 (quoting address by Chief Justice William H. Rehnquist), *available at* https://www.cato.org/pubs/pas/pa-208.html ("There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders."); Hon. Anthony M. Kennedy, "Speech at the American Bar Association Annual Meeting," Aug. 9, 2003, *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html ("In too many cases, mandatory minimum sentences are unwise and unjust."); Hon. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENTENCING RPTR. 180 (1999) (expressing agreement with such criticisms and noting that he "would add others," including the fact that mandatory minimums emasculate the U.S. Sentencing Commission; "they skew the entire set of criminal punishments"; "they may permit the prosecutor, not the judge, to select the sentence" through charging decisions; and they do not accomplish the goal of uniformity in sentencing).

STATEMENT

On November 13, 2002, Petitioner Weldon Angelos was charged in a five-count indictment, including one count of carrying or possessing a firearm during or in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c).[2] Plea negotiations between the government and Angelos went as follows:

> On January 20, 2003, the government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, the government would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time.

App. 35-36. When plea negotiations were unsuccessful, the government obtained two superseding indictments on, respectively, June 18, 2003 and October 1, 2003. It eventually charged Angelos with twenty total counts, including five violations of 18 U.S.C. § 924(c), which carried a potential mandatory minimum sentence of 105 years.

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[2] The following is based on the facts as found by the District Court. *See* App. 32-38. With respect to some factual issues, the appellate panel substituted its own factual findings for those made by the trial judge and jury, *see* App. 26-27, thereby acting as a sort of super-factfinder without the benefit of having participated in any part of the trial proceedings. Needless to say, this was flatly inconsistent with established precedent. *See, e.g., Mickens v. Taylor*, 535 U.S. 162, 177 (2002) ("Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous."); *United States v. Arvizu*, 534 U.S. 266, 276 (2002) (noting "District Court's superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom"). In this instance, however, the Court may simply ignore the appellate panel's inappropriate findings since the questions presented do not involve and are not affected by these disparities.

In early December 2003, the case was tried before a jury. Angelos was convicted on sixteen counts, including three of the five § 924(c) counts. Following extensive briefing, the District Court issued a memorandum opinion and order on November 16, 2004. Although it found that the mandatory minimum sentence in this case met all of the requirements for a successful Eighth Amendment challenge – that is, Petitioner's punishment was "unjust, cruel, and even irrational" under the three-part test of *Solem* and *Harmelin* (App. 33, 102) – the court nonetheless concluded that it was constrained from striking down Angelos's sentence by this Court's decision in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*). The District Court therefore sentenced Mr. Angelos to a prison term of 55 years and one day.

Mr. Angelos appealed to the United States Court of Appeals for the Tenth Circuit, raising, *inter alia*, constitutional and statutory challenges to his sentence. On January 9, 2006, the appellate panel issued an opinion rejecting all of Angelos's claims, including the argument that his sentence violated the Eighth Amendment. His petition for rehearing and rehearing *en banc* was denied on April 4, 2006.

REASONS FOR GRANTING THE PETITION

The Court's review is warranted to resolve the uncertainty over the precedential value of the *per curiam* opinion in *Hutto v. Davis*, especially in light of the recent decisions in *Ewing v. California*, 538 U.S. 11 (2003), and *Lockyer v. Andrade*, 538 U.S. 63 (2003), both of which embraced the three-part analysis of *Solem* and *Harmelin*. Until this Court clarifies the status of *Hutto v. Davis*, lower courts will continue to be confused and conflicted regarding the proper Eighth Amendment analysis that they should employ. More generally, the lower courts have long been uncertain as to the precedential value of summary

dispositions on the merits,[3] and they will remain so until guidance is provided by the Supreme Court. This case provides an excellent vehicle to address the confusion.

I. The Uncertain Status of *Hutto v. Davis* Confuses this Court's Otherwise Clear Guidance Regarding the Proper Analysis of Eighth Amendment Claims.

This Court has recognized the constitutional principle of proportionality in sentencing for nearly a century, acknowledging the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). In particular, the Eighth Amendment prohibition was directed at "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Id.* at 371 (*quoting O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)). Therefore, "[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards," *Hutto v. Finney*, 437 U.S. 678, 685 (1978), and "no penalty is *per se* constitutional." *Solem v. Helm*, 463 U.S. 277, 290 (1983).

In *Solem v. Helm*, the Court articulated the modern Eighth Amendment test to determine whether a term of imprisonment amounts to cruel and unusual punishment, holding "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem*, 463 U.S. at 289. According to the *Solem* Court, "proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. This three-part test was later

[3] Supreme Court Rule 16.1 states: "After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits." SUP. CT. R. 16.1 (2005).

adopted by Justice Kennedy in his concurrence in *Harmelin v. Michigan*, in which he concluded that the Eighth Amendment forbids "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

Both this Court and the lower federal courts have relied upon the *Solem-Harmelin* three-part analysis as the appropriate Eighth Amendment standard. *See Ewing v. California*, 538 U.S. 11, 23-24 (2003) (noting that "Justice Kennedy's concurrence [in *Harmelin*] guide[s] our application of the Eighth Amendment"); *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999), *cert. denied*, 531 U.S. 830 (2000) ("Justice Kennedy's opinion controls because it both retains proportionality and narrows *Solem*."). Admittedly, "the precise contours of [the test] are unclear," given that the "precedents in this area have not been a model of clarity" and "have not established a clear or consistent path for courts to follow." *Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2003). Nonetheless, "[t]hrough this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges," *id.* at 72: The Constitution bans grossly disproportionate punishment.

A. The Confusion Created By *Hutto v. Davis* in Angelos's Case

Consistent with this line of Eighth Amendment jurisprudence, the District Court evaluated Angelos's sentence pursuant to the *Solem-Harmelin* analysis. *See* App. 87-92. Under the first factor, it concluded that Petitioner's 55-year sentence "strongly suggests not merely disproportionality, but gross disproportionality," *id.* at 91, in light of the following factual findings:

> Mr. Angelos has no prior adult criminal convictions and is treated as a first-time offender under the Sentencing Guidelines. The sentence-triggering criminal conduct in this case is also modest. Here, on two occasions while selling small amounts of marijuana, Mr. Angelos possessed a handgun under his clothing, but he never brandished or used

> the handgun. The third relevant crime occurred when the police searched his home and found handguns in his residence. . . . Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person.

Id. at 90. The District Court then turned to the second factor, which required a comparison of Mr. Angelos's punishment to "the sentences imposed on other criminals in the same jurisdiction," *Solem*, 463 U.S. at 291; *see also Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring) – namely, the sentences imposed on other offenders in the federal system. App. 91. Concluding that this factor was also satisfied, the District Court pointed out that "Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes." *Id.* at 92; *see also id.* at 61-75 (conducting similar analysis under equal protection principles).

Finally, the District Court considered the third factor, "compar[ing] the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 291; *see also Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring). In concluding that "Mr. Angelos' sentence is longer than he would receive in any of the fifty states," App. 92; *see also id.* at 59-60, the District Court noted the prosecution's concession that Petitioner "would serve about five to seven years" had he been convicted in state court. *Id.* at 92 (citing government's sentencing memorandum).[4] Based on this analysis, the District Court determined that the *Solem-Harmelin* factors "lead to the conclusion that Mr.

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[4] In fact, when the District Court "asked the Probation Office to determine what the penalty would have been in Utah state court had Mr. Angelos been prosecuted there," it reported that the defendant "would likely have been paroled after serving about two to three years in prison." App. 59.

Angelos' sentence violates the Eighth Amendment." *Id.* at 92-93.

Nevertheless, it did not strike down Petitioner's sentence. According to the District Court, the decision in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*) – which upheld a 40-year sentence for crimes involving less than nine ounces of marijuana – foreclosed a ruling that Angelos's sentence violates the Eighth Amendment. *See* App. 92-94. In other words, *Hutto v. Davis* muddied what appeared to be a clear result under the analysis of *Solem* and *Harmelin*. This confusion requires the Court's review.

B. The Apparent Purposes and Limits of Summary Dispositions

For years, Justices and commentators alike have noted the uncertain status of *per curiam* opinions like *Hutto v. Davis*, in which the Court simultaneously grants certiorari and issues an opinion and judgment on the merits of the case without full briefing and oral argument. One of the reasons these opinions are "[t]he most controversial form of summary disposition," ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 320 (8th ed. 2002), is the uncertainty regarding their precedential value. Indeed, the Court has noted on several occasions that *per curiam* summary dispositions are of "precedential value," but they are "not of the same precedential value" as opinions rendered after full briefing and oral argument. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *see Hohn v. United States*, 524 U.S. 236, 251 (1998).

Summary dispositions on the merits have long been criticized by legal commentators as procedurally unfair to the parties and fraught with peril for practitioners and the lower judiciary. *See, e.g.*, STERN ET AL., *supra*, at 320-21, 324-26; 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4004.5, at 87 (2d ed. 1996) ("The practice increases the risk of erroneous disposition, and must leave at least the losing party feeling victimized by an unfair and unforeseen procedure."); *see*

also Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77 (1958) (essay criticizing the Court's summary disposition practice); *cf.* Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29 (1992); William J. Schneier, *The Do's and Don'ts of Determining the Precedential Value of Supreme Court Dispositions*, 51 BROOK. L. REV. 945 (1985); Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983). But with the expanded use of summary dispositions accompanied by brief *per curiam* opinions, "mounting criticism has arisen from within the Court," expressed in numerous dissents from such opinions. STERN ET AL., *supra*, at 320-21; *see also* WRIGHT ET AL., *supra*, at 81-87; *cf.* Hon. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982).

Because the *per curiams* themselves generally do not respond to criticism, "nor do they seek to justify the purposes or the procedures of summary disposition," STERN ET AL., *supra*, at 321, the only guidance is provided by fragments of Court opinions, the Justices' dissents, and scholarly analysis. For instance, several Justices have written that summary dispositions of this type are inappropriate where the resolution "makes new law" or is a "law-changing decision," *Bunkley v. Florida*, 538 U.S. 835, 842 (2003) (Rehnquist, C.J., dissenting); *Purkett v. Elem*, 514 U.S. 765, 770 (1995) (Stevens, J., dissenting), or when the issue presented is so novel, complicated, or consequential as to deserve plenary consideration by the Court. *See, e.g., Major League Baseball Player's Assn. v. Garvey*, 532 U.S. 504, 512-13 (2001) (Stevens, J., dissenting); *United States v. Watts*, 519 U.S. 148, 170-71 (1997) (Kennedy, J., dissenting). Instead, *per curiam* summary dispositions are "usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (*quoting Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *see also Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting) ("extraordinary remedy of summary reversal" unwarranted where lower

court decision was "not clearly erroneous").[5] In particular,

[5] The following opinions also discuss these purposes and limitations: *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (*per curiam*) (summary reversal of lower court decision as "flatly contrary to this Court's controlling precedent"); *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999) (*per curiam*) ("a summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law"); *Rhodes v. Stewart*, 488 U.S. 1, 5 (1988) (Blackmun, J., dissenting) (summary disposition inappropriate for "novel legal issues"); *C.I.R. v. Asphalt Products Co.*, 482 U.S. 117, 123 (1987) (Blackmun, J., concurring in part and dissenting in part) (disposition inappropriate unless "the correct result is so obvious and the Court of Appeals so clearly in error that summary reversal is warranted"); *E.E.O.C. v. F.L.R.A.*, 476 U.S. 19, 26 n.5 (1986) (Stevens, J., dissenting) (summary dispositions "customarily reserve[d] for settled issues of law"); *Thompson v. Louisiana*, 469 U.S. 17, 18 (1984) (*per curiam*) (summary disposition appropriate where lower court "holding is in direct conflict" with Supreme Court decision); *Rushen v. Spain*, 464 U.S. 114, 131 (1983) (Marshall, J., dissenting) ("important constitutional questions deserve more careful consideration than" provided by summary disposition); *Torres-Valencia v. United States*, 464 U.S. 44, 44-45 (1983) (Rehnquist, J., dissenting) (summary disposition is "appropriate where a lower court has demonstrably misapplied our cases in a manner which has led to an incorrect result" but not to correct isolated legal errors); *Wyrick v. Fields*, 459 U.S. 42, 52 (1982) (Marshall, J., dissenting) (summary disposition improper "in a case that involves a significant issue not settled by our prior decisions"); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 272, 275 (1982) (Blackmun, J., dissenting) (summary disposition inappropriate where prior precedents do not "mandate" or "compel" reversal); *Hutto v. Davis*, 454 U.S. 370, 387 (1982) (Brennan, J., dissenting) (summary disposition improper when "employed to change or extend the law in significant respects"); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 466-67 (1979) (Marshall, J., dissenting) (summary disposition inappropriate for "deciding vital constitutional questions"); *Leis v. Flynt*, 439 U.S. 438, 458 (1979) (Stevens, J., dissenting) (summary disposition "egregiously improvident when the Court is facing a 'novel constitutional question' "); *Pennsylvania v. Mimms*, 434 U.S. 106, 124 (1977) (Stevens, J., dissenting) (summary disposition inappropriate for "a novel constitutional question"); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*) (summary dispositions "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved"); *Eaton v. Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting) (summary disposition "should be reserved for palpably clear cases of constitutional error"). Individual Justices have also balked at the use of summary disposition: (i) in cases of local importance only; (ii) simply to correct lower court errors and trivial mistakes; (iii) when one party is at

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summary disposition has been utilized to enforce the mandate of a previous order, such as when the lower court "apparently misunderstood the terms of our remand," *Sumner v. Mata*, 455 U.S. 591, 596-97 (1982) (*per curiam*) – or, worse yet, where the lower court failed to comply with the remand and "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system," as was the case in *Hutto v. Davis*, 454 U.S. at 374-75.

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a unique disadvantage; or (iv) to resolve a split among the federal circuit courts. *See, e.g., Dyson*, 527 U.S. at 467 (Breyer, J., dissenting) (summary disposition inappropriate "where the respondent is represented by a counsel unable to file a response"); *Arkansas State Highway Employees*, 441 U.S. at 467 n.* (Marshall, J., dissenting) (summary disposition is "especially inappropriate means of resolving conflicts between the United States Courts of Appeals"); *Calderon v. Coleman*, 525 U.S. 141, 147-52 (1998) (Stevens, J., dissenting); *Thomas v. American Home Products, Inc.*, 519 U.S. 913, 916-18 (1996) (Rehnquist, C.J., dissenting); *Illinois v. Batchelder*, 463 U.S. 1112, 1120 (1984) (Stevens, J., dissenting) (summary disposition inappropriate where there was no "counsel to represent the party defending the judgment of the court below"); *Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting) ("It is not appropriate for this Court to expend its scarce resources crafting [*per curiam*] opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law."); *Board of Educ. of Rogers, Ark. v. McCluskey*, 458 U.S. 966, 971-73 (1982) (Stevens, J., dissenting) (summary disposition inappropriate for error correction and cases without national importance); *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (summary disposition inappropriate for "the correction of errors in lower court decisions"); *Watt v. Alaska*, 451 U.S. 259, 273-76 (1981) (Stevens, J., concurring) (summary disposition inappropriate simply "to correct what we perceive to be mistakes committed by other tribunals"); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979) (Stevens, J., dissenting) (summary disposition inappropriate "for the sole purpose of correcting a highly technical and totally harmless error"); *Alabama v. Pugh*, 438 U.S. 781, 782-83 (1978) (Stevens, J., dissenting) (summary disposition inappropriate to correct "harmless errors"); *Idaho Department of Employment v. Smith*, 434 U.S. 100, 104 (1977) (Stevens, J., dissenting) (summary disposition inappropriate for mere error correction and when "losing litigant is too poor to hire a lawyer"); Hon. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 232 (1983) (summary disposition inappropriate "unless at least all of us believe that the judgment below flatly rejects the controlling authority of one of our decisions").

Whatever their virtues, summary dispositions have obvious shortcomings. On several occasions, individual Justices have criticized the procedural unfairness of this mechanism, depriving some parties of "their 'day in court' in a singularly inappropriate manner." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 272 (1982) (Blackmun, J., dissenting); *see also Montana v. Hall*, 481 U.S. 400, 405-06 (1987) (Marshall, J., dissenting) (describing injustice at length); STERN ET AL., *supra*, at 320, 324-26. Some members of the Court have also suggested that summary dispositions damage the integrity of the proceedings, show insufficient respect for the lower courts as well as for dissenting Justices, and, in criminal cases, have tended to favor the government over the defendant. *See, e.g., Hall*, 481 U.S. at 405, 408-10 (Marshall, J., dissenting); *Colorado v. Connelly*, 474 U.S. 1050, 1050-51 (1986) (Brennan and Stevens, JJ., mem.); *Florida v. Meyers*, 466 U.S. 380, 385-87 (1984) (Stevens, J., dissenting); *see also Bunkley*, 538 U.S. at 844, 844 n.2 (2003) (Rehnquist, C.J., dissenting) (describing as "unjustified" *per curiam* opinion's criticism of lower court "for failing to anticipate this holding" and for "failing to reach its holding in a sufficiently clear manner"); *Purkett*, 514 U.S. at 774 n.8 (Stevens, J., dissenting) (describing *per curiam* opinion's criticism as "singularly inappropriate" and "disrespectful to the conscientious judges on the Court of Appeals").

C. The Confusion and Uncertain Status of Summary Dispositions

But the most significant problem posed by summary dispositions is the potential for erroneous decisions and confusion among the lower courts, made worse by the uncertain precedential value of such *per curiam* opinions. Several Justices have objected to rendering important decisions without the benefit of briefs on the merits and oral argument. *See, e.g., Brosseau*, 543 U.S. at 207 (Stevens, J., dissenting) ("The Court's attempt to justify its decision to reverse the Court of Appeals without giving the parties an opportunity to provide full briefing and oral

argument is woefully unpersuasive."); *Bunkley*, 538 U.S. at 842 (2003) (Rehnquist, C.J., dissenting) ("The Court here makes new law, and does so without briefing or argument."); *Mireles*, 502 U.S. at 15 (Scalia, J., dissenting) ("I frankly am unsure whether the Court's disposition or Justice Stevens' favored disposition is correct; but I am sure that, if we are to decide this case, we should not do so without briefing and argument.").[6] "Not only [does the Court] reach these summary dispositions without the benefit of thorough briefing, but the Court often acts without obtaining the complete record of the proceedings below." *Hall*, 481 U.S. at 407 (Marshall, J., dissenting).

The end result is a decision on the merits based solely on the certiorari papers and the limited record before the Court, raising the possibility of a mistaken, imprudent, or muddled *per curiam* opinion that can perplex the lower courts.

> [B]y deciding cases summarily, without benefit of oral argument and full briefing, and often with only limited access to, and review of, the record, this Court runs a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this Court is immune from making mistakes, particularly under these kinds of circumstances. As Justice Jackson so aptly put it, although in a somewhat different context: "We are not

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[6] *See also Garvey*, 532 U.S. at 513 (Stevens, J., dissenting) ("Without the benefit of briefing or argument, today the Court resolves two difficult questions."); *Stewart v. LaGrand*, 526 U.S. 115, 121 (1999) (Stevens, J., dissenting) ("I would not decide such an important question without full briefing and argument."); *Pounders v. Watson*, 521 U.S. 982, 993 (1997) (Stevens, J., dissenting) ("Because I believe that these questions are important and not clearly answered by our precedents – indeed, the Court does not cite a single case that is at all comparable to this one on its facts – it is unwise to answer it without full briefing and argument."); *Purkett*, 514 U.S. at 770 (Stevens, J., dissenting) ("[I]t is unwise for the Court to announce a law-changing decision without first ordering full briefing and argument on the merits of the case."). Objections to the lack of oral argument and briefing on the merits were also raised in many of the opinions listed in footnote 5, *supra*.

> final because we are infallible, but we are infallible only because we are final."

Harris v. Rivera, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting) (*quoting Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result)); *see, e.g., Garvey*, 532 U.S. at 513 n.* (Stevens, J., dissenting) (describing part of summary disposition as "ambiguous," "unclear," and offering "no explanation of what standards it is using or of its reasons for reaching that conclusion"); *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 897-98 (1997) (Rehnquist, C.J., dissenting) (describing summary disposition as "muddled and cryptic" and arguing that "the judges of the Court of Appeals are, in fairness, entitled to some clearer guidance from this Court than what they are now given"); *cf. Youngblood v. West Virginia*, 126 S. Ct. 2188, 2191 (2006) (Scalia, J., dissenting) (objecting to summary disposition and remand "in light of nothing").[7]

The confusion created by a given *per curiam* opinion is then exacerbated by the uncertain precedential status of

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[7] *See also Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 50 (1990) (Marshall, J., dissenting) (summary dispositions "significantly increase the risk of an erroneous decision"); *Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (Marshall, J., dissenting) (summary dispositions "create a significant risk that the Court is rendering an erroneous or ill-advised decision that may confuse the lower courts"); *Lehman v. Trout*, 465 U.S. 1056, 1062 (1984) (Stevens, J., dissenting) ("[T]his case illustrates the dangers inherent in an excessive reliance on summary dispositions.... It is, of course, entirely possible that the Court has issued the right command as it gallops by this immense record. But if that be true, the Court is just lucky."); *Oregon State Penitentiary v. Hammer*, 434 U.S. 945, 946-47 (1977) (Stevens, J., dissenting) (criticizing summary disposition as providing only "a cryptic reference to a case ... wide of the mark" and giving "no guidance whatsoever for further proceedings in this litigation"); *Cameron v. Johnson*, 381 U.S. 741, 742 (1965) (Black, J., dissenting) ("A cryptic, uninformative *per curiam* order is no way, I think, for this Court to decide a case involving as this one does a State's power to make it an offense for people to obstruct public streets and highways and to block ingress and egress to and from its public buildings and properties."). In addition, concerns about erroneous decision-making and confusion in the lower courts were raised in many of the opinions listed in footnote 5, *supra*.

summary dispositions. On the one hand, myriad Court opinions have relied, often extensively, on *per curiam* summary dispositions. *See, e.g., Johnson v. California*, 543 U.S. 499, 506-07 (2005); *cf. id.* at 540 (Thomas, J., dissenting) ("This Court's brief, *per curiam* opinion in [*Lee v. Washington*, 390 U.S. 333 (1968)] simply cannot bear the weight or interpretation the majority places on it."); *United States v. Dixon*, 509 U.S. 688, 698 (1993); *cf. id.* at 714-18 (Rehnquist, C.J., concurring in part and dissenting in part) (criticizing reliance upon *Harris v. Oklahoma*, 433 U.S. 682 (1977), "a three-paragraph *per curiam* in an unargued case"). Indeed, at times the Court has expressly treated summary dispositions as fully binding and controlling precedents. *See, e.g., Hohn*, 524 U.S. at 252-53 (citing to a *per curiam* summary disposition, *Allen v. Hardy*, 478 U.S. 255 (1986), as one of "several noteworthy decisions which resolved significant issues of federal law" and noting that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981) ("the California Supreme Court was quite right in relying on our summary decisions as authority"); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (holding that "the lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not'") (citation omitted).

On the other hand, this Court and some individual Justices have noted repeatedly that "[a] summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion." *Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991); *see, e.g., Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) (noting that summary dispositions have lesser precedential value than opinions on the merits after briefing and argument); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (noting "our customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion"); *Hohn*, 524 U.S. at 251 ("[W]e have felt less constrained to follow precedent where . . . the opinion was

rendered without full briefing or argument."); *Central State Univ. v. American Assn. of Univ. Professors, Central State Univ. Chapter*, 526 U.S. 124, 129 (1999) (Ginsburg, J., concurring) (recognizing "that a summary disposition is not a fit occasion for an elaborate discussion" and citing *Hohn* for the proposition that "opinions rendered without full briefing or argument have muted precedential value"); *see also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 896 n.2 (1985) (O'Connor, J., dissenting); *Anderson v. Celebrezze*, 460 U.S. 780, 784-85, 784 n.5 (1983); *Metromedia*, 453 U.S. at 500; *Parker v. Randolph*, 442 U.S. 62, 75 n.8 (1979); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979); *Tully v. Griffin, Inc.*, 429 U.S. 68, 74-75 (1976); *Fusari v. Steinberg*, 419 U.S. 379, 392 (1975) (Berger, C.J., concurring); *Edelman*, 415 U.S. at 671.[8] It seems clear, then, that the precedential value of the Court's summary dispositions is now distinctly *unclear*.

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[8] It might be claimed that the distinction in precedential value relates to different eras of Supreme Court jurisdiction, with a lower value being attached to summary affirmances and summary dismissals for want of a substantial federal question, which "were common in the days when this Court had an extensive mandatory jurisdiction." *Hohn*, 524 U.S. at 259 (Scalia, J., dissenting); *cf.* STERN ET AL., *supra*, at 279-85 (discussing Court's appellate jurisdiction and precedential effect of summary dispositions). This argument is greatly undermined, however, by the fact that contemporary Court opinions have not discriminated between types of summary dispositions – those from certiorari jurisdiction versus those from appellate jurisdiction – in discussing the precedential value of such decisions. *See, e.g.*, *Hohn*, 524 U.S. at 251 (citing to *Gray v. Mississippi*, 481 U.S. 648, 651 n.1 (1987), as "questioning the precedential value of *Davis v. Georgia*, 429 U.S. 122 (1976) (*per curiam*)," a certiorari summary disposition); *U.S. Bancorp Mortgage Co.*, 513 U.S. at 23-24 (questioning the value of two certiorari summary dispositions, *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) (*per curiam*) and *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (*per curiam*), by citing to a case discussing summary affirmances on appeal, *Edelman*, 415 U.S. at 670-71); *Dixon*, 509 U.S. at 716 (Rehnquist, C.J., concurring in part and dissenting in part) (stating that a given certiorari summary disposition, *Harris*, 433 U.S. 682 (1977), is of lesser precedential value by citing to *Edelman* and *Doehr*, 501 U.S. at 12 n.4, both of which

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Not surprisingly, the lower courts have reached very different conclusions when interpreting and applying summary dispositions. Here are a few recent examples: *Compare In re Municipal Reapportionment of Tp. of Haverford*, 873 A.2d 821, 834-36 (Pa. 2005) (not bound by *Cox v. Larios*, 542 U.S. 947 (2004)); *with id.* at 841-43 (Pellegrini, J., dissenting) (bound by *Cox*). *Compare Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004), *cert. dismissed*, 545 U.S. 660 (2005) (bound by *Breard v. Greene*, 523 U.S. 371 (1998)); *with United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002) (not bound by *Breard*). *Compare In re Kandu*, 315 B.R. 123, 135-38 (W.D. Wash. 2004) (not bound by *Baker v. Nelson*, 409 U.S. 810 (1972)); *and Smelt v. County of Orange*, 374 F. Supp. 2d 861, 872-74 (C.D. Cal. 2005), *vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006) (not bound by *Baker*); *with Hernandez v. Robles*, 805 N.Y.S.2d 354, 368-69 (2005) (Catterson, J., concurring) (bound by *Baker*), *and Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055, 1126-27 (2004) (Kennard, J., concurring in part and dissenting in part) (bound by *Baker*).

In the past, lower court confusion over the precedential value of a given summary disposition has lingered until rectified by plenary consideration by the Supreme Court. One example is provided by *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), a summary disposition which affirmed a district court judgment upholding a state sodomy statute. Subsequently, the lower courts (and individual judges) were split concerning the precedential value

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refer to summary affirmances). Some might even argue that the failure to distinguish among the various forms of summary disposition has only added to the confusion. Moreover, the uncertainty over summary dispositions may have been aggravated by recent "GVR" opinions as well. *See, e.g.*, *Youngblood*, 126 S. Ct. at 2190-93 (Scalia, J., dissenting); *id.* at 2193 (Kennedy, J., dissenting); *Lawrence v. Chater*, 516 U.S. 163, 177-92 (1996) (Scalia, J., dissenting). Scholars have also discussed the confusion at length. *See, e.g.*, Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513 (2004).

of *Doe*, with some declaring it fully binding and others rejecting it as a controlling precedent. *See, e.g., Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) (*Doe* binding); *id.* at 293 (Goldberg, J., dissenting) (*Doe* non-binding); *Hardwick v. Bowers*, 760 F.2d 1202, 1210 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986) (*Doe* non-binding); *id.* at 1213-14 (Kravitch, J., concurring in part and dissenting in part) (*Doe* binding); *Constant A. v. Paul C.A.*, 496 A.2d 1, 4-5 (Pa. 1985) (*Doe* binding); *id.* at 11 (Beck, J., dissenting) (*Doe* non-binding); *Dronenburg v. Zech*, 741 F.2d 1388, 1391-92 (D.C. Cir. 1984) (*Doe* binding); *State v. Mueller*, 671 P.2d 1351, 1355-56 (Haw. 1983) (*Doe* non-binding); *People v. Onofre*, 51 N.Y.2d 476, 493-94 (1980), *cert. denied*, 451 U.S. 987 (1981) (*Doe* non-binding). The Supreme Court eventually took up the issue, "prefer[ing] to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*." *Bowers v. Hardwick*, 478 U.S. 186, 189 n.4 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).[9]

A more recent example of lower court confusion involved the Court's summary disposition in *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*), which rejected a Double Jeopardy Clause challenge to the use of acquitted conduct at sentencing. In the mere six months between the Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and its decision in *United States v. Booker*, 543 U.S. 220 (2005),

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[9] Other instances of lower court confusion include the following: *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 94 n.11 (1983) (describing the "rather mystifying" sequence of events that led a lower court to initially declare that summary dispositions on ERISA-preemption were binding precedents, only to reverse itself based on an intervening "'doctrinal development' that warranted departure from the precedent set by the Court's summary dispositions"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 494-95, 494 n.6 (1996) (describing confusion and disagreement among lower courts over earlier summary disposition on an alcohol advertising ban and concluding that "[w]e are now persuaded that the importance of the First Amendment issue, as well as the suggested relevance of the Twenty-first Amendment, merits more thorough analysis"); *see also* Schneier, *supra* (critiquing lower court's attempt to assess the precedential significance of summary dispositions on electoral reapportionment).

the lower federal courts were sharply divided over the value and relevance of *Watts* in determining whether the *Blakely* decision applied to the Federal Sentencing Guidelines. *See, e.g., United States v. Singh*, 390 F.3d 168, 191 (2d Cir. 2004) (citing to *Watts* and refusing to apply *Blakely* to federal guidelines); *United States v. Hammoud*, 381 F.3d 316, 352-53 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005) (refusing to apply *Blakely* to federal guidelines and noting that "[w]e must also be mindful of the effect of an incorrect reading of *Blakely* on *United States v. Watts*"); *id.* at 370-71 (Motz, J., dissenting) (distinguishing *Watts* and stating that "[i]n refusing to follow *Blakely*'s plain language, purportedly because to do so would 'undermine' or 'outright nullify' prior Supreme Court precedent," the majority "avoids our constitutional duty to decide properly presented claims in accord with *current* Supreme Court instruction"); *United States v. Olivera-Hernandez*, 328 F. Supp. 2d 1185, 1186-87 (D. Utah 2004) ("A *Blakely*-type holding striking down the Sentencing Guidelines would arguably require the Supreme Court to strike down . . . *United States v. Watts*. . . . Such overruling of binding United States Supreme Court precedent should come from the pen of the author of a majority opinion for the Supreme Court, not from a district court judge."); *see also United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005) (dismissing relevance of *Watts* to Sixth Amendment *Blakely* issue); *id.* at 517 (Easterbrook, J., dissenting) (describing *Watts* as one of the "casualties of the [Seventh Circuit's] approach"); *United States v. Koch*, 383 F.3d 436, 439-40 (6th Cir. 2004), *vacated*, 544 U.S. 995 (2005); *United States v. Pineiro*, 377 F.3d 464, 472-73, 472 n.6, 474 (5th Cir. 2004), *vacated*, 543 U.S. 1101 (2005); *cf. United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004), *certified question dismissed by* 543 U.S. 1117 (2005) (discussing *Watts* and certifying questions to the Supreme Court); *United States v. Mueffelman*, 327 F. Supp. 2d 79, 83 n.9 (D. Mass. 2004) ("If the Guidelines are advisory, which is the outcome I believe *Blakely* dictates, the *Watts* decision would be moot. If the Guidelines remain intact, with upward enhancements subject to a jury trial, the decision in *Watts* would have to be reconsidered."); *United States v. Hankins*,

329 F. Supp. 2d 1225, 1235 (D. Mont. 2004) (noting tension between *Watts* and *Blakely*); *United States v. McKinney*, 339 F. Supp. 2d 1314, 1318-19 (N.D. Fla. 2004) (similar).

With the foregoing in mind, it is not hyperbolic to describe the jurisprudence on summary dispositions as a mess. Given the Court's conflicting use of summary dispositions – sometimes affording them little weight while at other times relying on them heavily – and the lower court confusion and division over their precedential value, additional guidance in this area would be welcome and appropriate. This case affords the Court just such an opportunity.

D. The Uncertain Status of *Hutto v. Davis* in Particular

As it turns out, a case evaluating the status of *Hutto v. Davis* would be a particularly appropriate vehicle to examine the precedential value of summary dispositions on the merits. This is because the Supreme Court's *per curiam* opinion in *Davis* did not focus on the underlying facts of the case but instead concerned the role of the federal appellate courts and their interaction with this Court. *See Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977), *rev'd*, *Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978), *aff'd on reh'g*, *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979), *vacated*, *Hutto v. Davis*, 445 U.S. 947 (1980), *on remand to Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd*, *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*).

The relevant background is as follows: In the 1973 case, *Hart v. Coiner*, 483 F.2d 136, 140-43 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974), the Fourth Circuit adopted a multi-part Eighth Amendment analysis to determine whether a given sentence is constitutionally disproportionate. This test provided the basis for the lower court decision that defendant Davis's sentence violated the Eighth Amendment. *See Davis v. Zahradnick*, 432 F. Supp. at 451-53. The following year, this Court rejected the *Hart* analysis in *Rummel v. Estelle*, 445 U.S. 263 (1980). Less than two weeks later, the Court remanded *Davis* to the Fourth Circuit to review the decision in light of *Rummel*.

The Fourth Circuit, however, neither sent the case back to the district court for further proceedings nor did it attempt to distinguish *Rummel*. Instead, it ruled without explanation that "[t]he judgment of the district court is affirmed on an equal division of the *en banc* court." *Davis v. Davis*, 646 F.2d at 124. In contrast, three dissenting circuit judges viewed the Supreme Court's remand as crystal clear, that "the disposition of the present *en banc* court in this case should have been a simple reversal," and that a decision to the contrary was in spite of *Rummel*. *Id.* at 124-25 (Widener, J., joined by Russell and Hall, JJ., dissenting).

The Fourth Circuit's action inspired a majority of the Supreme Court to reprimand the lower court for disregarding its command: "Not only did we expressly recognize *Hart* as the primary opposing authority, but our opinion [in *Rummel*] also disapproved of each of its four 'objective' factors." *Davis*, 454 U.S. at 373. Because the lower court analysis "was clearly guided by these factors, the Court of Appeals erred in affirming." *Id.*

> More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases "by virtue of their commissions, not their competence." And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel*. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.

Id. at 374-75. As such, the Court's *per curiam* summary disposition was used to enforce the mandate of a previous order, with a particular focus on the hierarchy and function of the federal courts. As described by dissenting Justice Brennan, however, "the Court had misused precedent" and "inappropriately . . . invoke[d] its power of summary disposition," resulting in a terse reversal and

remand "[w]ith the benefit of neither full briefing nor oral argument." *Id.* at 381, 387 (Brennan, J., dissenting).

Regardless of its propriety, the summary disposition in *Davis* was not designed as a seminal or ground-breaking constitutional decision after plenary review of the underlying case. Instead, it was merely policing lower court compliance with a Court order. Most importantly, *Davis*'s rejection of Eighth Amendment proportionality analysis soon would be relegated to history, when the Supreme Court decided *Solem v. Helm* a year later. In that case, the Court concluded that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences." *Solem*, 463 U.S. at 288. In fact, *Solem* embraced an Eighth Amendment analysis that had been rejected in *Rummel*, including three of the factors previously adopted in *Hart* and applied by the lower courts in *Davis*. *See id.* at 292. Since then, several Justices have noted the difficulty of squaring *Davis* with *Solem*. *See Harmelin*, 501 U.S. at 965 (opinion of Scalia, J., joined by Rehnquist, C.J.) ("Having decreed that a general principle of proportionality exists, the [*Solem*] Court used as the criterion for its application the three-factor test that had been explicitly rejected in both *Rummel* and *Davis*."); *id.* at 998 (Kennedy, J., concurring) ("Our most recent pronouncement on the subject in *Solem* . . . appeared to apply a different analysis than in *Rummel* and *Davis*.").

As a result, the lower courts have experienced difficulty in trying to ferret out the meaning of *Davis*. *See, e.g.*, *Close v. People*, 48 P.3d 528, 533-34 (Colo. 2002) ("the *Davis* Court did not prohibit proportionality reviews"); *Wilson v. State*, 830 So.2d 765, 772 (Ala. 2001) (*Davis* "disapproved of the proportionality analysis applied by the lower court" and *Solem* "represented a significant departure" from *Davis*); *United States v. Lowden*, 955 F.2d 128, 131 (1st Cir. 1992) (finding it significant that "three justices [in *Harmelin*] cited [*Davis*] with seeming acceptance and approval"); *State v. Jonas*, 792 P.2d 705, 716 (Ariz. 1990) (Feldman, J., dissenting) ("*Solem* rejected *Hutto*'s basic premise that the Eighth Amendment does not apply to prison terms. *Hutto* provides no authority for finding the sentence in this case proportionate.");

Williams v. State, 539 A.2d 164, 171 (Del. 1988), *cert. denied*, 488 U.S. 969 ("In *Hutto*, the Court did not attempt to determine whether a proportionality review would be appropriate in the case before it or to set forth criteria for determining when such review would be necessary for a prison sentence."); *Minor v. State*, 546 A.2d 1028, 1034 (Md. 1988) (Eldridge, J., concurring in the judgment) ("The majority, following the lead of some courts, approaches sentence proportionality review under the Eighth Amendment as if the controlling principles are those set forth in *Rummel v. Estelle* and *Hutto v. Davis*, and as if *Solem v. Helm* is of extremely limited applicability."); *id.* at 1036 (Adkins, J., dissenting) ("I read *Helm* as effectively overriding *Rummel* and *Hutto*"); *Oakley v. State*, 715 P.2d 1374, 1376 (Wyo. 1986) ("In *Solem*, the United States Supreme Court adopted a proportionality analysis by embracing the concept they had forcefully rejected in *Rummel* and *Hutto*."); *United States v. Rhodes*, 779 F.2d 1019, 1028-29 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (interpreting *Solem* in light of the "Court's refusal to overrule *Rummel* and *Davis*"); *State v. Harris*, 677 P.2d 625, 634 (N.M. 1984) ("Until the United States Supreme Court provides more specific guidance ... we will follow *Hutto v. Davis* which holds that successful challenges to the proportionality of particular sentences should be exceedingly rare."); *State v. Cooper*, 304 S.E.2d 851, 855 n.4 (W.Va. 1983) ("The United States Supreme Court has emasculated the concept of proportionality in its *per curiam* opinion in *Hutto v. Davis*.").[10]

The treatment of Mr. Angelos's legal challenges illustrates the potentially bewildering effect of a summary disposition on the merits by short *per curiam* opinion in the absence of full briefing and oral argument. Not only is *Davis*

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[10] Moreover, *Davis* continues to be criticized by legal scholars. *See, e.g.*, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 637-38 (2005); *cf.* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach To Cruel And Unusual Punishment*, 84 KY. L.J. 107, 120 n.80 (1995-1996) (describing disturbing factual background of *Davis* prosecution).

of ambiguous precedential value, but its lack of detailed legal analysis inhibited the ability of the lower courts to recognize otherwise clear distinctions between *Davis* and the present case.[11] Instead of considering the possibility of distinguishing *Davis* – particularly in light of the "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion," *U.S. Bancorp Mortgage Co.*, 513 U.S. at 24 – the courts below compared the raw facts in the present case with those in *Davis* and deemed the latter binding as a result. App. 25, 93-94.

The present case, then, is a good vehicle for this Court to examine the precedential value of summary dispositions on the merits. While some lower courts have acknowledged the questionable status of summary dispositions and provided in-depth analysis of changes in jurisprudence and distinctions between their case and the relevant *per curiam* opinion, the decisions in this case accepted *Davis* as though it were a plenary opinion after full briefing and argument. Nor did the lower court decisions recognize the underlying purpose of the Court's summary disposition in *Davis* as a means to enforce its previous remand. Given *Davis*'s particularly uncertain place in the precedential landscape as noted by several Justices, and the uncertainty it engenders with respect to the proper Eighth Amendment analysis as demonstrated by this case, the Court's review is warranted.

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[11] Among other things: (1) The defendant in *Davis* was a recidivist previously convicted of selling LSD. *Davis*, 454 U.S. at 380 n.10 (Powell, J., concurring in the judgment). Mr. Angelos, on the other hand, is a first-time offender. (2) The judge and jury in *Davis* maintained substantial discretion in sentencing and could have punished the defendant with as little as 5 years' imprisonment. *See Davis v. Davis*, 585 F.2d at 1228; *see also Davis*, 454 U.S. at 371. The sentencing judge in the present case had no discretion. (3) The federal courts in *Davis* were reviewing a state sentence through the limited ambit of a federal writ of habeas corpus. *Davis*, 454 U.S. at 371-72; *see generally Calderon v. Thompson*, 523 U.S. 538, 554-56 (1998) (discussing limitations on federal collateral review of state proceedings). Here, the District Court and appellate panel were in the posture of directly evaluating Mr. Angelos's 55-year sentence rather than on collateral review.

E. *Hutto v. Davis* Is No Longer Good Law Based on Current Standards

In addition, the 40-year sentence in *Davis* – like the 55-year sentence in the present case – violates "evolving standards of decency," *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (*quoting Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)), and thus it is inconsistent with the constitutional ban on cruel and unusual punishment. The meaning of the Eighth Amendment is not "frozen when it was originally drafted," *Roper*, 356 U.S. at 587 (Stevens, J., concurring), and "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). As the Court has repeatedly stated, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 311-12 (*quoting Trop*, 356 U.S. at 100-01); *see also Roper*, 356 U.S. at 560-61.

"Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent,'" *Atkins*, 536 U.S. at 312 (*quoting Harmelin*, 501 U.S. at 1000), and this Court has "pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, 536 U.S. at 312 (*quoting Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Thirteen years after upholding the death penalty for mentally retarded criminals, the Court struck down the practice due in large part to the fact that various states had subsequently abolished capital punishment in such cases. *See Atkins*, 536 U.S. at 313-17. Likewise, the Court recently struck down the death penalty for juvenile offenders only a decade and a half after it had affirmed the practice, again because of the legislative movement against capital punishment for those under the age of majority. *See Roper*, 543 U.S. at 564-68. In neither case had legislative unanimity been achieved in the intervening

period between the Court's original opinion upholding the punishment and its decision striking down the practice. It was enough that a large number of states had prohibited the punishment. *See Atkins*, 536 U.S. at 315-16; *Roper*, 543 U.S. at 564-66.

In terms of objective criteria for guiding proportionality review pursuant to evolving standards of decency, the basis for reconsidering *Davis* proves far more compelling than that presented in *Atkins* and *Roper*. At the time of his conviction, the defendant in *Davis* received a sentence that was more than three and a half decades longer than the average punishment for marijuana offenders in the relevant jurisdiction (Virginia) and a quarter-century longer than the maximum sentence that had, in fact, been doled out. *Davis*, 454 U.S. at 378 n.8 (Powell, J., concurring in the judgment). Moreover, only five years after Davis's trial, the state "reduced the maximum penalty for offenses of which Davis was convicted," resulting in a "maximum [that] is less than half the sentence Davis received" and evidencing Virginia's "sentencing judgment that marihuana possession and distribution in small amounts no longer would justify Davis' sentence." *Id.* at 379. Today, the crimes at issue in *Davis* would produce a maximum sentence of 20 years and could result in no incarceration at all. *See* VA. CODE ANN. §§ 18.2-10(e), 18.2-248.1(a)(2).

In fact, it appears that no jurisdiction would impose a 40-year sentence for distributing 2.96 ounces of marijuana and possessing with intent to distribute 5.93 ounces of marijuana, and only a couple of states make such punishment a theoretical possibility (e.g., Montana) simply by virtue of maintaining broadly indeterminate sentencing schemes (e.g., one year to life for drug distribution). The vast majority of states currently set punishment at a fraction of what Davis received a quarter-century ago. *See, e.g.*, ILLICIT DRUG POLICIES: SELECTED LAWS FROM THE 50 STATES (2002). Nationally, the average sentence for individuals convicted of marijuana trafficking is two years, three months. *See* RYAN S. KING & MARC MAUER, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990S, at 24 (2005). This evolution presents

a compelling reason for the Court to reconsider and clarify its decision in *Davis*.[12]

II. This Case is a Particularly Egregious Example of the Confusion Caused by Summary Dispositions as Well as the Problems of Eighth Amendment Analysis.

Other mandatory minimum cases involving less extreme sentences have been assailed by members of the federal judiciary. *See, e.g., United States v. Yirkovsky*, 276 F.3d 384, 385 (8th Cir. 2001) (Arnold, J., dissenting from denial of rehearing *en banc*), *cert. denied*, 536 U.S. 964 (2002); Hon. Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001); *cf.* Hon. John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (op-ed by federal judge who resigned his position due to "the distress I feel at being part of a sentencing system that is unnecessarily cruel and rigid"); Erik Luna, *Drug Exceptionalism*, 47 VILLANOVA L. REV. 753, 799-803 (2002) (providing citations to judicial criticisms of drug-related sentences). Nonetheless, this Court has expressed caution in its jurisprudence, holding that the Eighth Amendment's "gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Andrade*, 538 U.S. at 76. But the punishment challenged here is precisely that – an extraordinary instance of grossly disproportionate punishment – and when a case such as this appears, the judiciary must be empowered to declare that the Eighth Amendment and the Court's jurisprudence are not merely hortatory declarations.

This case involves "a twenty-four-year-old first offender who is a successful music executive with two young children," who received a 55-year sentence for carrying "a

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[12] It might be noted that four members of the Court – Justices Brennan, Marshall, Powell, and Stevens – believed that defendant Davis's sentence was unjust and disproportionate, although Powell "reluctantly conclude[d]" that the case was controlled by *Rummel v. Estelle*. *Davis*, 454 U.S. at 375 (Powell, J., concurring in the judgment).

handgun to two $350 marijuana deals" and having "several additional handguns at his home." App. 32. "For these three acts of possessing (not using or even displaying) these guns," Mr. Angelos will "essentially spend the rest of his life in prison," a sentence that the District Court deemed "unjust, cruel, and even irrational." *Id.* at 32-33. The punishment is far in excess of the federal sentence for:

- an aircraft hijacker (maximum term of 24 years, 5 months)
- a terrorist who detonates a bomb in a public place intending to kill a bystander (maximum term of 19 years, 7 months)
- a racist who attacks a minority individual with the intent to kill and does, in fact, inflict permanent or life-threatening injuries (maximum term of 17 years, 6 months)
- a spy who gathers top secret information (maximum term of 17 years, 6 months)
- a second-degree murderer (maximum term of 14 years)
- a criminal who assaults with the intent to kill and does, in fact, inflict permanent or life threatening injuries (maximum term of 12 years, 7 months)
- a kidnapper (maximum term of 12 years, 7 months)
- a saboteur who destroys military materials (maximum term of 12 years, 7 months)
- a rapist of a 10-year-old child (maximum term of 11 years, 3 months)
- a child pornographer who photographs a 12-year-old child in sexually explicit positions (maximum term of 9 years)
- a criminal who provides weapons to support a dangerous foreign terrorist organization (maximum term of 8 years, 1 month)
- a criminal who detonates a bomb in an aircraft (maximum term of 8 years, 1 month)
- a rapist (maximum term of 7 years, 3 months)

See id. at 63-65.

Ironically, Mr. Angelos's 55-year sentence for possessing a firearm three times in connection with minor marijuana offenses is more than twice the federal sentence for a *kingpin*

of a major drug trafficking ring in which a *death results* (maximum term of twenty-four years, five months), and more than four times the sentence for a marijuana dealer *who shoots an innocent person during a drug transaction* (maximum term of twelve years, two months). *See id.* "Amazingly," the District Court noted, "Mr. Angelos' sentence under § 924(c) is still far more severe than criminals who committed, for example, three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes." *Id.* at 66-67. Moreover, Angelos's sentence is longer than he would have received in any other jurisdiction. *Id.* at 92. To put it bluntly, this first-time, low-level offender is treated as though he were the marijuana equivalent of Al Capone or Manuel Noriega. Yet not even these ruthless, violent criminals received the unforgiving sentence that was doled out in this case – Capone was sentenced to a total of eleven years imprisonment, while Noriega received a forty-year sentence. *See United States v. Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997) (noting Noriega's sentence); Hon. David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 21 (noting that Capone was given an eleven-year sentence "after years of murdering, stealing, extorting, smuggling, and bribing with impunity"). Due to the extreme punishment for modest criminal conduct committed by a first-time offender, this case provides an ideal vehicle to clarify the proper proportionality analysis under the Eighth Amendment, including considering the status of *Davis* in this landscape. In the process, the Court can provide much needed guidance on the precedential value of summary dispositions like *Davis*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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433 F.3d 738

UNITED STATES of America,
Plaintiff-Appellee,

v.

Weldon ANGELOS,
Defendant-Appellant.

George M. Anderson; Russell T. Baker, Jr.; Donald L. Beckner; Griffin B. Bell; Harold J. Bender; Thomas K. Berg; Rebecca A. Betts; James S. Brady; James R. Britton; B. Mahlon Brown, III; Buck Buchanan; Wayne A. Budd; David B. Bukey; Robert C. Bundy; William R. Burkett; A. Bates Butler, III; Mark W. Buyck, Jr.; Edward N. Cahn; J.A. Tony Canales; David J. Cannon; Zachary W. Carter; Jim R. Carrigan; Robert J. Cindrich; Benjamin R. Civiletti; Charles Clark; Robert J. Cleary; W.J. Michael Cody; Kendall Coffey; Janice McKenzie Cole; Veronica F. Coleman-Davis; James F. Companion; William B. Cummings; Margaret E. Curran; E. Bart Daniel; John G. Davies; Robert J. Del Tufo; Michael H. Dettmer; Joseph E. Digenova; W. Thomas Dillard; Harry D. Dixon, Jr.; Edward L. Dowd, Jr.; Ronald F. Ederer; John S. Edwards; Edgar W. Ennis, Jr.; Robert B. Fiske, Jr.; J. Don Foster; Daniel J. French; Susan Getzendanner; John J. Gibbons; Jonathan L. Goldstein; Tony M. Graham; Charles E. Graves; Saul A. Green; David Warner Hagen; Hal D. Hardin; Jo Ann Harris; Frederick J. Hess; Stephen B. Higgins; Roger Hilfiger; Roscoe C. Howard, Jr.; James A. Hurd, Jr.; Guy G. Hurlbutt; John M. Imel; Brian A. Jackson; Thomas Penfield Jackson; J. Alan Johnson; James E. Johnson; Gaynelle G. Jones; Nathaniel R. Jones; David J. Jordan; Nicholas Deb. Katzenbach; J. Ransdell Keene; John J. Kelly; W.A. Kimbrough, Jr.; John E. Lamp; Scott R. Lassar; George N. Leighton; Stephen C. Lewis; Timothy K.

Lewis; Sidney I. Lezak; William J. Lockhart; Martin F. Loughlin; Andrew J. Maloney; Thomas J. Maroney; John S. Martin, Jr.; Sherry S. Matteucci; Ted L. McBride; Jay P. McCloskey; A. Melvin McDonald; Edward B. McDonough, Jr.; Frank J. McGarr; Patrick M. McLaughlin; H. Curtis Meanor; Kenneth J. Mighell; Abner J. Mikva; Irvin B. Nathan; James F. Neal; William A. Norris; K. William O'Connor; Denise O'Donnell; John O. Olson; Jerome F. O'Neill; Stephen M. Orlofsky; A. John Pappalardo; Robert M. Parker; Larry D. Patton; Terry L. Pechota; Layn R. Phillips; Harold J. Pickerstein; Richard J. Pocker; Sam C. Pointer, Jr.; George C. Pratt; William S. Price; John W. Raley, Jr.; Ronald S. Reed, Jr.; Ronald L. Rencher; Charles B. Renfrew; Janet Reno; James H. Reynolds; James G. Richmond; Jose De Jesus Rivera; William W. Robertson; James K. Robinson; James A. Rolfe; Benito Romano; Richard A. Rossman; Stanley J. Roszkowski; Robert J. Roth; Joseph Russoniello; Robert W. Rust; Stephen H. Sachs; H. Lee Sarokin; David M. Satz, Jr.; Carl Schnee; William S. Sessions; Abraham D. Sofaer; Henry L. Solano; Michael R. Spaan; Donald K. Stern; Herbert J. Stern; John W. Stokes, Jr.; J. Preston Strom, Jr.; Thomas P. Sullivan; Frederick W. Thieman Paul R. Thomson, Jr.; Victoria Toensing; Stanley A. Twardy, Jr.; Peter F. Vaira; Patricia M. Wald; Atlee W. Wampler, Iii Edward G. Warin; James J. West; Paul L. Westberg; Daniel E. Wherry; George W. White; Joseph M. Whittle; Francis M. Wikstrom; William D. Wilmoth; Alfred Wolin; Ronald G. Woods; Bob Wortham; Sharon J. Zealey; Donald E. Ziegler, Amici Curiae.

No. 04-4282.

App. 3

United States Court of Appeals,
Tenth Circuit.

Jan. 9, 2006.

Robert A. Lund, Assistant United States Attorney (Paul M. Warner, United States Attorney, with him on the briefs), District of Utah, Salt Lake City, UT, for Plaintiff-Appellee.

Jerome H. Mooney, Mooney Law Firm, Salt Lake City, UT; Erik Luna, Salt Lake City, UT, attorneys for Defendant-Appellant.

Jeffrey B. Sklaroff and Harry H. Rimm, Greenberg Traurig, New York, NY, filed ā brief on behalf of Amici Curiae.

Before BRISCOE, ANDERSON and O'BRIEN, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant Weldon Angelos was convicted of multiple drug, firearms, and money laundering offenses and sentenced to a term of imprisonment of fifty-five years and one day. Angelos now appeals his convictions and sentence. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

In May and June of 2002, the government, with the assistance of a confidential informant (CI), conducted three controlled purchases of marijuana from Angelos. On each of the three occasions, the CI purchased eight ounces

of marijuana from Angelos in exchange for cash. On two of the three occasions, the CI observed Angelos in possession of a 10 millimeter Glock pistol.

Angelos's involvement in the three controlled purchases led to his indictment by a federal grand jury on November 13, 2002. The indictment charged Angelos with three counts of marijuana distribution in violation of 21 U.S.C. § 841(a)(1), one count of carrying or possessing a firearm during or in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c), and one count of possessing a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k).

Angelos was subsequently arrested on November 15, 2002. A consensual search of Angelos's apartment produced three pounds of marijuana, three firearms, a large amount of cash, and two opiate suckers. A subsequent search at a house leased by Angelos produced, among other things, additional marijuana and several large duffle bags that contained marijuana residue.

On June 18, 2003, the government obtained a superseding indictment charging Angelos with seventeen criminal counts, including additional marijuana distribution counts and additional § 924(c) counts. On October 1, 2003, following the completion of a criminal investigation by the Internal Revenue Service, the government obtained a second superseding indictment charging Angelos with twenty criminal counts, including: six counts of distributing marijuana in violation of 21 U.S.C. § 841(a)(1) (Counts 1, 3, 5, 9, 13, 15); five counts of possessing a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) (Counts 2, 4, 10, 14, 16); two counts of possessing a stolen firearm in violation of 18

U.S.C. § 922(j) (Counts 6, 11); one count of possessing a firearm which had the importer's and manufacturer's serial number removed, obliterated and altered, in violation of 18 U.S.C. § 922(k) (Count 7); three counts of possessing a firearm while being an unlawful user of controlled substances in violation of 18 U.S.C. § 922(g)(3) (Counts 8, 12, 17); one count of engaging in and attempting to engage in a monetary transaction through or to a financial institution in criminally derived property in violation of 18 U.S.C. § 1957 (Count 18); and two counts of conducting and attempting to conduct financial transactions which involved the proceeds of marijuana distribution in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts 19, 20).

The case proceeded to trial in December 2003, where a jury found Angelos guilty of sixteen counts, including three § 924(c) counts. Following trial, a presentence investigation report (PSR) was prepared which recommended that Angelos, who had no prior adult criminal history, be sentenced to a term of imprisonment of sixty-one and a half (61.5) years, including six and a half (6.5) years for the drug and money laundering convictions and fifty-five (55) years for the three § 924(c) convictions. After receiving the PSR, the district court expressed concern about imposing what it characterized as "an extraordinarily long prison term," and thus directed the parties to file briefs addressing a number of sentencing-related issues, including whether the mandatory minimum sentences required under § 924(c) were consistent with the Eighth Amendment's prohibition against cruel and unusual punishment. App. at 106. Angelos argued in response that the fifty-five year sentence required to be imposed under § 924(c) violated the Eighth Amendment's prohibition against cruel

and unusual punishment. Angelos also asserted an Equal Protection challenge to § 924(c).

On November 16, 2004, the district court sentenced Angelos to a term of imprisonment of fifty-five years and one day. In doing so, the district court rejected Angelos's Eighth Amendment and Equal Protection challenges to his sentence.

II.

Denial of motion to suppress

On December 16, 2002, Chelsea Davenport, Angelos's former girlfriend, advised law enforcement agents that Angelos was hiding drugs, firearms, and money at a rental house located at 1701 East Fort Union Boulevard (the Fort Union house) in Salt Lake City.App. at 35-36. In particular, Davenport advised that she had observed marijuana in the trunk of a black BMW automobile parked in the garage at the Fort Union house (the same BMW that Angelos was observed driving when he sold marijuana to the CI), and that additional drugs, guns, and money were located in a safe in the basement of the Fort Union house. *Id.* Based upon this information, Federal Bureau of Investigation (FBI) agent Juan Becerra prepared an affidavit in support of a search warrant for the Fort Union house and the BMW. *Id.* at 35-38. In the affidavit, Becerra stated:

> Your Affiant desires to seize the safe belonging to Angelos, [and] the black 1993 BMW 318I used during the sale of drugs to [the CI]. Your Affiant also requests permission to seize any drug paraphernalia, illegal narcotics, any proceeds derived from these activities, any photographs, video tapes or other items pertaining to the sale and

> distribution of illegal narcotics and street gang affiliation and activities.

Id. at 37. Consistent with the practice in the District of Utah, Becerra presented his affidavit to an Assistant United States Attorney (AUSA) for preparation of an application for a search warrant and a proposed search warrant. Unlike the broader language contained in Becerra's affidavit, both the application and the proposed search warrant prepared by the AUSA requested permission to seize only "[m]arijuana and other indicia of narcotics in the trunk of the vehicle, 1993 BMW 318i, License Plate # 215J3" and the "personal safe located in the basement of the residence containing drugs, firearms, and money." *Id.* at 34, 40. The proposed search warrant was subsequently signed by a federal judge.

When law enforcement officers executed the search warrant, they first conducted a protective sweep of all three floors of the Fort Union house in order to ensure their safety. Upon entering the basement, the officers immediately detected a strong odor of raw marijuana. The odor seemed to be emanating from approximately eighteen large duffle bags that were in plain view. When the officers looked more closely at the duffle bags, they observed small amounts of marijuana residue on the exterior of the bags. Accordingly, the officers seized those bags. Six similar duffle bags, that also smelled of raw marijuana, were located in plain view in the garage of the Fort Union house and seized by the officers. In addition to seizing the duffle bags and the items specifically listed in the search warrant (i.e., narcotics from the trunk of the BMW and the safe located in the basement), the officers executing the warrant seized numerous other items from throughout the

Fort Union house, including firearms, documents, ammunition, a computer, gang-related clothing, and electronic scales.

Angelos moved to suppress the items seized from the Fort Union house. After conducting an evidentiary hearing, the district court denied Angelos's motion. On appeal, Angelos contends the district court erred in denying his motion to suppress. In reviewing the district court's decision, we "view the evidence in the light most favorable to the government, accept the district court's findings of fact unless clearly erroneous, and review de novo the ultimate determination of reasonableness under the Fourth Amendment." *United States v. Katoa*, 379 F.3d 1203, 1205 (10th Cir.2004).

a) Exceeding scope of search warrant

Angelos contends, as he did below, that the agents executing the search warrant exceeded the scope of the warrant by seizing items other than those specifically listed in the warrant. In ruling on Angelos's motion to suppress, the district court agreed "that the search warrant itself authorized only a search of the safe and the car," and did not extend to the Fort Union house as a whole. App. at 101. However, the district court concluded that "it was objectively reasonable for the [executing] officers to believe that the warrant authorized them to search the entire residence." *Id.* In reaching this conclusion, the district court noted that "the officers specifically sought a warrant to obtain the items specified in Special Agent Becerra's affidavit, which plainly established probable cause to search not just the basement for the safe but the entire residence." *Id.* Further, the district court

noted that "the warrant twice generally stated the location of the search as the 'residence/premises: 1701 East Fort Union Blvd, Salt Lake City, Utah 84121," and "also referred to the affidavit as the basis for probable cause." *Id.* These references, the district court concluded, could have led Becerra to reasonably believe that the "warrant authorized him to search the entire residence." *Id.* In sum, the district court concluded "it was objectively reasonable for the agents to think (and that they did in fact think) that they had obtained a search warrant to search the entire residence." *Id.*

"[T]he Fourth Amendment requires search warrants to 'particularly describ[e] the place to be searched, and the persons or things to be seized. . . .'" *Katoa,* 379 F.3d at 1207 (quoting Fourth Amendment). The warrant at issue here met the Fourth Amendment's particularity requirement by specifying the items to be seized from the Fort Union house, i.e., "[m]arijuana and other indicia of narcotics in the trunk of the vehicle, 1993 BMW 318i, License Plate # 215J3" and the "personal safe located in the basement of the residence containing drugs, firearms, and money." App. at 34, 40. Further, the warrant, on its face, contained no constitutional or clerical defects, and there was no ambiguity in the terms used in the warrant.

That leads to the question of the precise scope of the warrant. We review de novo the scope of the search warrant at issue, employing "a standard of practical accuracy rather than technical precision." *United States v. Ortega-Jimenez,* 232 F.3d 1325, 1328 (10th Cir.2000) (internal quotation marks omitted). Although the district court concluded that the scope of the warrant was limited to the specific items listed on its face (i.e., the narcotics in the trunk of the BMW and the safe located in the basement),

the government contends that the scope of the warrant included the entire Fort Union house. More specifically, the government asserts that we should adopt "a practical reading of the warrant" and, in doing so, should allow the warrant to be clarified by the supporting affidavit. Govt. Br. at 84.

In support of its arguments, the government cites to a single case, i.e., *Ortega-Jimenez*. In that case, law enforcement officers obtained a search warrant that authorized the search of a storage unit and any "persons and vehicles of individuals present and arriving" at the unit. 232 F.3d at 1328. In executing the warrant, the officers searched the person and vehicle of the defendant, who had been detained by authorities and brought to the storage unit prior to the warrant being issued. The district court, pursuant to the defendant's motion, suppressed the evidence seized from the defendant and his vehicle, concluding the defendant could not fairly have been considered "present" at the storage unit because he had been moved there by the police. On appeal, we noted that the term "present," as used in the search warrant, "might technically be interpreted to mean those who are voluntarily present at the time the warrant is signed. . . ." *Id.* at 1329. However, we concluded it was appropriate to "determine the *practical* meaning of the term. . . ." *Id.* (italics in original). In doing so, we turned to the affidavit submitted in support of the warrant, which clearly indicated that the defendant was being detained at the storage unit. In light of this information, we held that "[a] practical reading of the term 'present' must include those the judge knew actually were present at that time," and thus the search of the defendant and his vehicle fell "within the scope of the warrant." *Id.*

Although *Ortega-Jimenez* allows a court to adopt a "practical reading" of a disputed term in a search warrant, it is clear that there are no such terms in the search warrant at issue here. To the contrary, as noted, the warrant describes with particularity, and without ambiguity, the items to be seized from the Fort Union home. Thus, we conclude that none of the terms in the warrant can be read "with practicality" to encompass the entire premises.

That conclusion, in turn, requires us to decide whether the officers executing the warrant acted reasonably in exceeding the scope of the warrant and seizing items throughout the house. Although the government makes reference to the good faith exception announced by the Supreme Court in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), we conclude that exception is inapplicable here. In *Leon,* the Court held that evidence obtained pursuant to a constitutionally defective search warrant is admissible at trial if the officers executing the search warrant reasonably relied on the warrant and there is no evidence the officers mislead the magistrate issuing the warrant. *Id.* at 920-21, 104 S.Ct. 3405. Notably, the Court in *Leon* made reference to officers "properly execut[ing] [a] warrant and search[ing] only those places and for those objects that it was reasonable to believe were covered by the warrant." 468 U.S. at 918, n. 19, 104 S.Ct. 3405. In turn, we have held that "[t]he *Leon* good faith exception will not save an improperly executed warrant." *United States v. Rowland,* 145 F.3d 1194, 1208 n. 10 (10th Cir.1998). Given the circumstances of the search of the Fort Union house, it is apparent that the problem lies in the execution, and not the constitutionality, of the search warrant.

Angelos contends there are only two possible explanations for why the officers in this case exceeded the scope of the search warrant: either they "knew the limits of the warrant and decided to disregard them, or [they] never bothered to read the warrant itself." Aplt. Br. at 76. Either way, he argues, the officers are not entitled to rely on any type of good faith exception. We agree. Assuming the agents executing the warrant actually read it, they reasonably should have noticed its limited scope. In turn, the agents could have, upon realizing that the scope of the warrant was narrower than requested by Agent Becerra, contacted the issuing judge by phone in an attempt to receive authorization to expand the scope of the search to include the entire premises. *See Katoa,* 379 F.3d at 1208 (upholding search as reasonable where officers executing search, upon realizing that the warrant contained a defect or omission, made immediate contact with the issuing magistrate, received authorization for their actions, and the judge signed the warrant upon the officers' return). By failing to do so, the officers cannot be said to have acted reasonably.

That leaves only the question of what evidence should have been suppressed. Angelos contends that the proper remedy for the Fourth Amendment violation in this case is suppression of all the evidence seized by the officers, and not just the evidence that exceeded the scope of the warrant. Aplt. Br. at 74. He does not, however, provide any authority to support this remedy. In the absence of such authority, we conclude that only the seized evidence that exceeded the scope of the search warrant, and that was not covered by the plain smell/view exception, should have been suppressed. *See generally United States v. Harris,* 313 F.3d 1228, 1233 (10th Cir.2002) (noting the general

rule that "[a]ny evidence obtained as a result of an illegal search and seizure is subject to the exclusionary rule – i.e., the evidence cannot be used in a criminal proceeding against the victim of the illegal search and seizure.").

b) Plain smell exception

Angelos contends the district court erred in refusing to suppress the group of duffle bags that were seized by officers from the basement and garage of the Fort Union house due to the smell of raw marijuana emanating from them. Angelos does not deny that the officers smelled raw marijuana coming from the duffle bags. Instead, Angelos argues that, because the officers secured the house by performing a protective sweep, "[t]here was no exigent circumstance for [them] to rummage through the basement and garage in an attempt to locate the source of the smell." Aplt. Br. at 81.

We disagree. The "plain view" doctrine allows a law enforcement officer to seize evidence of a crime, without violating the Fourth Amendment, if "(1) the officer was lawfully in a position from which the object seized was in plain view, (2) the object's incriminating character was immediately apparent (i.e., there was probable cause to believe it was contraband or evidence of a crime), and (3) the officer had a lawful right of access to the object." *United States v. Thomas,* 372 F.3d 1173, 1178 (10th Cir.2004); *see Horton v. California,* 496 U.S. 128, 136-37, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). "The 'plain smell' doctrine," in turn, "is simply a logical extension of the 'plain view' doctrine. . . ." App. at 102; *e.g., United States v. Rhiger,* 315 F.3d 1283, 1290 (10th Cir.2003) (concluding that various factors, including agents' detection of strong

odor of cooking methamphetamine, justified warrantless search); *United States v. Clayton,* 210 F.3d 841, 845 (8th Cir.2000) (concluding that officer executing arrest warrant "quickly developed probable cause for a search based on his immediate perception of an odor associated with methamphetamine production"); *United States v. Haley,* 669 F.2d 201, 203 (4th Cir.1982) (concluding that the odor given off by a container can justify invocation of the "plain view" doctrine). Here, the district court found, and Angelos does not dispute, that the officers executing the search warrant (1) were lawfully in the Fort Union house, (2) had lawful authority to conduct a protective sweep of the entire premises, including the garage and basement[1], (3) smelled a strong odor of raw marijuana coming from duffle bags in the basement and garage, all of which were in plain sight, and (4) observed residue of marijuana on the duffle bags in the basement. We conclude these circumstances, considered together, clearly justified the seizure of the duffle bags.[2]

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[1] Although Angelos contends a protective sweep is justified only pursuant to an arrest, we have previously upheld a search where the officers conducted a protective sweep of a house which was the subject of a search warrant. *See United States v. King,* 222 F.3d 1280, 1283 (10th Cir.2000).

[2] In its appellate brief, the government argues that several other items, including a rifle, surveillance equipment, body armor, and booby traps "were all discovered and seized because they were in plain view of the officers." Govt. Br. at 88. We conclude it is unnecessary to address these arguments in detail, given the strength of the government's evidence underlying the offenses of conviction. In other words, even assuming these items were not properly seized under the plain view doctrine and should have been suppressed, we conclude their introduction at trial was harmless beyond a reasonable doubt.

c) Was admission of the suppressible evidence harmless?

The government contends that, even if some of the evidence seized from the Fort Union house should have been suppressed, its admission at trial was harmless. Because the error was of constitutional magnitude, we apply the harmless error standard outlined in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *See United States v. Fellers,* 397 F.3d 1090, 1098 (8th Cir.2005). The *Chapman* standard requires the government to demonstrate that the error was "harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S.Ct. 824.

After carefully reviewing the record on appeal, including the trial transcript, we agree with the government that the admission of evidence improperly seized during the search of the Fort Union house was harmless beyond a reasonable doubt. To begin with, we note that the jury acquitted Angelos on three charges arising out of certain items seized at the Fort Union house: a handgun and a rifle, which formed the basis for two § 924(c) charges (Counts 14 and 16 of the second superseding indictment); and marijuana found in the Fort Union house, which formed the basis of a charge of possessing with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (Count 15 of the second superseding indictment). The only count of conviction directly arising out of the search of the Fort Union house was Count 13 of the second superseding indictment, which charged Angelos with possessing with intent to distribute marijuana located in the trunk of the black BMW parked in the garage of the Fort Union house. As outlined above, the search warrant for the Fort Union house specifically listed, as an item to be seized, the marijuana in the trunk of the BMW. Thus, we find no

basis for concluding that this conviction was tainted by introduction of any improperly seized evidence.

It is true that the jury also found Angelos guilty of Count 20 of the second superseding indictment, which charged him with violating 18 U.S.C. § 1956(a)(1)(A)(i) in December 2002 by paying rent for the Fort Union house with proceeds of marijuana distribution with the intent to use the Fort Union house to "store marijuana, cash, and other items related to the distribution of and possession with intent to distribute marijuana. . . ." App. at 23. Our review of the record on appeal, however, leads us to conclude that the properly admitted evidence in support of this conviction was so substantial "that it assured beyond a reasonable doubt that the jury would have returned a conviction even absent" any improperly admitted evidence. *Fellers,* 397 F.3d at 1099. For example, Angelos's former girlfriend, Chelsea Davenport, testified that she personally observed Angelos sell marijuana on a daily basis, and that Angelos sometimes did so at the Fort Union house. Davenport further testified that, on one occasion, she traveled with Angelos and two other individuals to California and returned to Salt Lake City with a trunkload of duffel bags containing marijuana. Eric Lerohl, an FBI agent who was involved in the search of the Fort Union house, testified that the entire house emitted a very distinct odor of raw marijuana. Together, the testimony of Davenport and Lerohl was more than ample to have allowed the jury to reasonably conclude that the duffle bags seized during the search of the Fort Union house, which smelled of raw marijuana and contained marijuana residue, were the same duffle bags used by Angelos to transport marijuana from California to Salt Lake City. In light of this evidence, the admission of any items

improperly seized from the Fort Union house was merely cumulative and, in our view, harmless. In other words, any improperly seized evidence was not critical to the jury's finding that Angelos utilized the Fort Union house for his marijuana-trafficking activities.

Lastly, we conclude that the evidence in support of Angelos's remaining convictions was so substantial that it rendered harmless the admission of any evidence improperly seized from the Fort Union house. In particular, we note that the evidence in support of Angelos's § 924(c) convictions was overwhelming. The first two of those convictions were tied to Angelos's possession of a 10 millimeter Glock pistol during the first and second controlled purchases. At trial, the CI testified that during the first controlled purchase Angelos had the pistol tucked between the front seats of his vehicle, and during the second controlled purchase was wearing the pistol in an ankle holster. Sergeant Mazuran in turn testified that the CI reported these same observations immediately following each of the first two controlled purchases. Christopher Maez and Scott Hansen, deputies with the Salt Lake County Sheriff's Office, testified that on July 10, 2002, they responded to a fight involving Angelos and, during the course of investigating the incident, seized a 10 millimeter Glock pistol that Angelos was wearing in an ankle holster. Lastly, Chelsea Davenport, Angelos's former girlfriend, testified that, during the course of their relationship, Angelos consistently carried a black gun in an ankle holster, particularly when selling drugs. Together, this evidence overwhelmingly supported the jury's findings that Angelos knowingly carried and possessed the pistol during the first and second controlled purchases. Angelos's third § 924(c) conviction was based upon three weapons

seized during the post-arrest search of his apartment. Notably, Angelos does not dispute that he possessed those weapons. Nor does he seriously dispute that he used that apartment for the distribution of drugs. Thus, we conclude that the admission of evidence improperly seized from the Fort Union house was harmless with respect to this final § 924(c) conviction.

District court's refusal to admit police reports

Angelos contends the district court erred in refusing to admit contemporaneous law enforcement reports of the first two controlled purchases. Although Angelos was charged with and convicted of possessing a firearm during those first two transactions, Angelos asserts that the contemporaneous law enforcement reports of those two transactions contained no mention of a firearm and thus were relevant and admissible. We review a district court's evidentiary rulings for abuse of discretion. *United States v. Montague,* 421 F.3d 1099, 1101 (10th Cir.2005). Under that standard, we will reverse "only for a clearly erroneous finding of fact or an erroneous conclusion of law or . . . a clear error in judgment." *Id.* at 1102 (internal quotation marks omitted).

At trial, the law enforcement officer who drafted the contemporaneous reports, Sergeant Mazuran, testified on direct examination that, immediately following the first two transactions, the CI reported observing Angelos in possession of a gun (the CI likewise testified to the same thing). On cross-examination by Angelos's counsel, Mazuran admitted that he failed to include this information in the contemporaneous reports he prepared. In light of Mazuran's testimony, the admission of the reports themselves

would have been only cumulative. Indeed, at one point during the trial, Angelos's counsel, in response to the district court's question whether he was seeking to admit the reports, stated that he wanted the reports admitted but did not want them to go to the jury. Aplee. App. at 569. Although Angelos's counsel subsequently changed his mind and asked for the reports to be admitted, the district court rejected that request and Angelos's counsel made no attempt to explain why the reports were admissible or to question the district court's ruling. Accordingly, we conclude the district court did not abuse its discretion in refusing to admit the reports.

Eighth Amendment challenge to Angelos's sentences

Angelos, joined in an amicus brief filed by a group of individuals, including former federal judges, United States Attorneys General, and high-ranking United States Department of Justice officials, contends the district court erred in concluding that the fifty-five year sentence mandated in his case by § 924(c) did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. We review de novo the question of whether a criminal sentence violates the Eighth Amendment. *E.g., United States v. Fernandez,* 388 F.3d 1199, 1258 (9th Cir.2004); *United States v. Myers,* 280 F.3d 407, 416 (4th Cir.2002).

"The Eighth Amendment ... contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Ewing v. California,* 538 U.S. 11, 20, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (quoting *Harmelin v. Michigan,* 501 U.S. 957, 996-97, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)). Under this narrow proportionality principle, the

Eighth Amendment "does not require strict proportionality between crime and sentence." *Id.* at 23, 123 S.Ct. 1179. "Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* (quoting *Harmelin,* 501 U.S. at 1001, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment)).

Although the Supreme Court has reviewed Eighth Amendment challenges to a number of state and federal sentences, it has struck down only two of them over the past century. In *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the Court invalidated under the Eighth Amendment a sentence of fifteen years in chains and at hard labor, plus permanent surveillance and civil disabilities, for the crime of falsifying a public document. Seventy-three years later, in *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), the Court invalidated under the Eighth Amendment a sentence of life imprisonment without the possibility of parole imposed under South Dakota law against a nonviolent recidivist whose final crime was writing a "no account" check with the intent to defraud.

In contrast to these two cases, the Supreme Court has rejected Eighth Amendment challenges to the following sentences:

> • A life sentence, with the possibility of parole, under a Texas recidivist statute for successive convictions of (1) fraudulent use of a credit card to obtain $80 worth of goods or services, (2) passing a forged check in the amount of $28.36, and (3) obtaining $120.75 by false pretenses. *Rummel v. Estelle,* 445 U.S. 263, 285, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

> • A forty-year sentence for possession and distribution of 9 ounces of marijuana. *Hutto v. Davis,* 454 U.S. 370, 375, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982).
>
> • A life sentence, without the possibility of parole, for possession of more than 650 grams of cocaine. *Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680.
>
> • A twenty-five year to life sentence imposed under a California recidivist statute for the offense of felony grand theft (i.e., stealing three golf clubs worth approximately $1,200). *Ewing,* 538 U.S. at 30-31, 123 S.Ct. 1179.
>
> • Two consecutive twenty-five-year to life sentences under a California recidivist statute for two counts of petty theft. *Lockyer v. Andrade,* 538 U.S. 63, 77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Considered together, these cases clearly support the Supreme Court's recent statement in *Andrade* that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case." 538 U.S. at 76, 123 S.Ct. 1166.

Applying these principles to the case at hand, we conclude that this is not an "extraordinary" case in which the sentences at issue are "grossly disproportionate" to the crimes for which they were imposed. The Supreme Court has noted that the "basic purpose" of § 924(c) is "to combat the 'dangerous combination' of 'drugs and guns.'" *Muscarello v. United States,* 524 U.S. 125, 126, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) (quoting *Smith v. United States,* 508 U.S. 223, 240, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)). The Court has also noted that "the provision's chief

legislative sponsor . . . said that the provision seeks 'to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" *Id.* (quoting 114 Cong. Rec. 22231 (1968) (Rep.Poff)). In addition, the Court has concluded that it was entirely rational for Congress to penalize the mere presence of a firearm during a drug transaction: "Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society." *Smith,* 508 U.S. at 239, 113 S.Ct. 2050 (internal quotation marks omitted). In this same vein, the Third Circuit has held that "[i]t is likely that Congress," in enacting § 924(c), "meant . . . to protect our communities from violent criminals who repeatedly demonstrate a willingness to employ deadly weapons by punishing them more harshly." *United States v. Couch,* 291 F.3d 251, 255 (3d Cir.2002). In sum, the lengthy sentences mandated by § 924(c) were intended by Congress to (a) protect society by incapacitating those criminals who demonstrate a willingness to repeatedly engage in serious felonies while in possession of firearms, and (b) to deter criminals from possessing firearms during the course of certain felonies. Notably, both of these penological theories have been held by the Supreme Court to be valid and subject to deference by the courts. *See Ewing,* 538 U.S. at 24-28, 123 S.Ct. 1179; *Harmelin,* 501 U.S. at 998-99, 111 S.Ct. 2680.

Although Angelos attempts to downplay the nature of his crimes, the record on appeal clearly supports the jury's findings that Angelos possessed a handgun during the course of the first two controlled purchases, and likewise possessed firearms at his apartment in conjunction with drug-trafficking materials. All of these firearms appear to

have facilitated his drug trafficking by, if nothing else, providing protection from purchasers and others. Although Angelos emphasizes that he never used any of the firearms, his possession of the firearms clearly heightened the threat of danger to society. In particular, it undoubtedly increased the likelihood of violence occurring to neighbors in and around the residences where the firearms were maintained, as well as to others that happened to be in the vicinity of wherever he chose to conduct his drug transactions.

It is also important to note that Angelos's possession of firearms facilitated his possession and distribution of illegal drugs. In *Harmelin,* the Supreme Court emphasized the seriousness of drug trafficking crimes, noting that the "[p]ossession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population.'" 501 U.S. at 1002, 111 S.Ct. 2680 (quoting *Treasury Employees v. Von Raab,* 489 U.S. 656, 668, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)). In particular, "drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture." *Id.* at 1002, 111 S.Ct. 2680. Thus, as in *Harmelin,* Angelos's "suggestion that his crime was nonviolent . . . is false to the point of absurdity." *Id.* at 1002, 111 S.Ct. 2680. "To the contrary," his "crime[s] threatened to cause grave harm to society." *Id.*

Thus, Congress "could with reason conclude that the threat posed to the individual and society" by possessing firearms in connection with serious felonies, in particular drug-trafficking crimes, was "momentous enough to warrant

the deterrence and retribution" of lengthy consecutive sentences, such as those imposed on Angelos in this case. *Id.* at 1003, 111 S.Ct. 2680. In turn, that is enough to conclude that the sentences imposed on Angelos are not grossly disproportionate to his crimes. *Id.* at 1004, 111 S.Ct. 2680 ("The severity of petitioner's crimes brings his [life sentence without parole] within the constitutional boundaries established by our prior decisions.").

The district court reached this same conclusion, but took a somewhat different route. The district court initially concluded that it was required to examine three "factors" first mentioned in Justice Powell's dissenting opinion in *Davis,* and subsequently discussed in *Solem* and *Harmelin:* "(1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions." App. at 175. Applying these factors, the district court concluded that "the 55-year enhancement" it was required to impose pursuant to § 924(c) was grossly disproportionate to the crimes committed by Angelos. *Id.* at 177. In support of this conclusion, the district court stated that Angelos "did not engage in force or violence, or threats of force or violence. . . ." *Id.* Further, the district court noted that, under the Sentencing Guidelines, the penalty for Angelos's "firearms conduct" would be "about 24 months. . . ." *Id.* With respect to the second "factor," the district court concluded that § 924(c) effectively treated Angelos "in the same manner as, or more severely than, criminals who have committed far more serious crimes." *Id.* at 178 (internal quotation marks omitted). With respect to the third factor, the district court concluded that Angelos's sentence under § 924(c) was "longer than he would receive in any of the

fifty states." *Id.* In sum, the district court concluded that analysis of these three factors led "to the conclusion that . . . Angelos' sentence violate[d] the Eighth Amendment." *Id.* at 179. However, the district court concluded that the Supreme Court's decision in *Davis* prevented it from declaring Angelos's sentence violative of the Eighth Amendment. *Id.* More specifically, the district court noted that "if 40 years in prison for possessing nine ounces of marijuana d[id] not violate the Eighth Amendment, it [wa]s hard to see how 61 years [the sentence urged by the government in this case] for distributing sixteen ounces (or more) would do so." *Id.*

Angelos argues that the district court erred in concluding that the Supreme Court's decision in *Davis* remains good law and in turn concluding that the decision in *Davis* required the district court to reject Angelos's Eighth Amendment challenge to his sentence. The flaw in Angelos's argument is his assertion that *Davis* is no longer good law. Although the Court in *Davis* rejected application of the three-factor test later discussed in *Solem* and *Harmelin,* it is the ultimate holding in that case (i.e., that a forty-year sentence for a marijuana trafficking crime does not violate the Eighth Amendment) that remains important. Further, the Supreme Court has continued to recognize and discuss *Davis* anytime it has been faced with an Eighth Amendment challenge to a sentence – thereby clearly indicating that the holding in *Davis* remains "good law."

The amici "suggest that once [*Harmelin's*] three factor test has been satisfied, the analysis ends, and a finding that a sentence is unconstitutional under *Harmelin* is not inconsistent with *Davis.*" This suggestion, however, is only partially correct. As noted in *Hawkins v. Hargett,* 200 F.3d

1279, 1282 (10th Cir.1999), "Justice Kennedy's opinion in *Harmelin* . . . sets forth the applicable Eighth Amendment proportionality test." Under that test, a court first examines whether the sentence at issue is grossly disproportionate to the crime for which it was imposed. *Id.* If there is no gross disproportionality, that is the end of the analysis; only if gross disproportionality is found must a court "proceed to the comparative analyses" of the second and third factors. *Id.*

Importantly, however, that does not change the outcome here because, for the reasons discussed in detail above, it is clear that the first, and controlling, "factor" in *Harmelin,* i.e., whether the sentence at issue is grossly disproportionate to the crime, has not been satisfied. Although the district court concluded that Angelos's sentence was disproportionate to his crimes, we disagree. In our view, the district court failed to accord proper deference to Congress's decision to severely punish criminals who repeatedly possess firearms in connection with drug-trafficking crimes, and erroneously downplayed the seriousness of Angelos's crimes. Although it is true that Angelos had no significant adult criminal history, that appears to have been the result of good fortune rather than Angelos's lack of involvement in criminal activity. The evidence presented by the government at trial clearly established that Angelos was a known gang member who had long used and sold illicit drugs. Further, the government's evidence established that, at the time of his arrest, Angelos was a mid-to-high drug dealer who purchased and in turn sold large quantities of marijuana. In addition, the government's evidence established that Angelos possessed and used a number of firearms, some stolen, to facilitate his drug-dealing activities. Lastly, the evidence established

that although Angelos had some involvement in the music industry, he failed to financially profit from that involvement and indeed never reported any positive earnings to the Internal Revenue Service. Thus, the only reasonable inference that could be drawn was that Angelos's sole source of income was his drug-trafficking operations.

In sum, we conclude there is no merit to Angelos's Eighth Amendment challenge to his sentence under § 924(c). *See United States v. Beverly,* 369 F.3d 516, 537 (6th Cir.2004) (rejecting Eighth Amendment challenge to § 924(c) sentences and noting that "the Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment.").

Equal Protection challenge
to Angelos's sentences

Angelos also challenges his sentence on Equal Protection grounds, arguing that his sentence is the product of "an irrational legislative scheme that implicates the judicial branch's core duty of criminal sentencing and entails incomparable consequences for the individual defendant." Aplt. Br. at 8. We review constitutional challenges to a sentence de novo. *United States v. Eaton,* 260 F.3d 1232, 1236 (10th Cir.2001).

The parties in this case appear to agree that the appropriate level of scrutiny to be applied in resolving Angelos's Equal Protection claim is the rational basis test, since Angelos has not alleged a discriminatory intent on the part of Congress in enacting the mandatory minimum sentencing scheme outlined in § 924(c). To pass muster

under the rational basis test, § 924(c) must "have a legitimate purpose," and it must have been "reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose." *Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 668, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981).

Section 924(c) easily survives the rational basis test. As previously discussed, the "basic purpose" of § 924(c) was "to combat the 'dangerous combination' of 'drugs and guns.'" *Muscarello,* 524 U.S. at 126, 118 S.Ct. 1911. Clearly, this purpose is legitimate, given the recognized negative impact drugs and violence have upon society. Further, it was well within reason for Congress to believe that use of the mandatory minimum sentencing scheme outlined in § 924(c) would achieve this basic purpose by (a) incapacitating those criminals willing to possess firearms during drug-trafficking crimes, and (b) deterring other criminals from engaging in such dangerous conduct. *See generally Chapman v. United States,* 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) ("Congress has the power to define criminal punishments without giving the courts any sentencing discretion.").

Alternative construction of § 924(c)

Lastly, Angelos contends the district court could have avoided any constitutional problems by interpreting § 924(c) so as to treat his three marijuana distribution convictions as a "grouping of related acts," and in turn applying "only the 5-year mandatory minimum sentence under 18 U.S.C. § 924(c)(2)(A)(i)." Aplt. Br. at 63. Angelos's contention, however, finds no support in the language of § 924(c). Section 924(c) provides enhanced penalties for "any person

who, during and in relation to any . . . drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm. . . ." 18 U.S.C. § 924(c)(1)(A). Section 924(c) defines the term "drug trafficking crime" as "any felony punishable under the Controlled Substances Act., the Controlled Substances Import and Export Act., or the Maritime Drug Law Enforcement Act. . . ." 18 U.S.C. § 924(c)(2). A defendant's first conviction under § 924(c) carries a mandatory minimum five-year sentence that must run consecutively to any other sentences. 18 U.S.C. § 924(c)(1)(A)(i). A second or subsequent conviction under § 924(c) carries a mandatory minimum twenty-five year sentence that must run consecutively to any other sentences. 18 U.S.C. § 924(c)(1)(C)(i). Here, it is undisputed that Angelos was convicted of three separate violations of § 924(c), each occurring on a different date, and each in connection with a separate "drug trafficking crime." In light of those three convictions, § 924(c) clearly mandated the imposition of a fifty-five year sentence (five years for the first conviction, and twenty-five years for the second and third convictions).

AFFIRMED.

345 F.Supp.2d 1227

UNITED STATES of America,
Plaintiff,

v.

Weldon ANGELOS, Defendant.

No. 2:02-CR-00708PGC.

United States District Court,
D. Utah, Central Division.

Nov. 16, 2004.

Jeffrey B. Sklaroff, Harry H. Rimm, Greenberg Traurig LLP, New York, NY, amicus.

Jerome H. Mooney, Mooney Law Firm, Salt Lake City, UT, for Defendant.

Richard W. Daynes, Robert A. Lund, U.S. Attorney's Office, for Plaintiff.

MEMORANDUM OPINION AND ORDER IMPOSING DENYING MOTION TO FIND 18 U.S.C. § 924(c) UNCONSTITUTIONAL, IMPOSING SENTENCE, AND RECOMMENDING EXECUTIVE CLEMENCY

CASSELL, District Judge.

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Introduction

Defendant Weldon Angelos stands now before the court for sentencing. He is a twenty-four-year-old first offender who is a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agree that Mr. Angelos should serve about six to eight years in prison. But there are three additional firearms offenses for which the court must also impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insists that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urges the court to sentence Mr. Angelos to a prison term of no less than 61½ years – six years and a half (or more) for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relies on a statute – 18 U.S.C. § 924(c) – which requires the court to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. Under § 924(c), the three counts produce 55 years of additional punishment for carrying a firearm.

The court believes that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational. Adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year sentence that the congressionally-created expert agency (the United States Sentencing Commission) believes is appropriate for possessing firearms under the same circumstances. The 55-year sentence substantially exceeds what the jury recommended to the court. It is also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeds what recidivist criminals will likely serve under the federal "three strikes" provision. At the same time, however, this 55-year additional sentence is decreed by § 924(c).

The court's role in evaluating § 924(c) is quite limited. The court can set aside the statute only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment. After careful deliberation, the court reluctantly concludes that it has no choice but to impose the 55 year sentence. While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties. Under the controlling case law, the court must find either that a statute has no conceivable justification or is so grossly disproportionate to the crime that no reasonable argument can be made its behalf. If the court is to fairly apply these precedents in this case, it must reject Mr. Angelos' constitutional challenges. Accordingly, the court sentences Mr. Angelos to a prison term of 55 years and one day, the minimum that the law allows.

To correct what appears to be an unjust sentence, the court also calls on the President – in whom our Constitution reposes the power to correct unduly harsh sentences – to commute Mr. Angelos' sentence to something that is more in accord with just and rational punishment. In particular, the court recommends that the President commute Mr. Angelos' sentence to no more than 18 years in prison, the average sentence that the jurors in this case recommended. In addition, the court also calls on Congress to modify § 924(c) so that its harsh provisions for 25-year multiple sentences apply only to true recidivist drug offenders – those who have been sent to prison and failed to learn their lesson. Because of the complexity of these conclusions, the court will set out their basis at some length.

I. Factual Background

Weldon Angelos is twenty-four years old. He was born on July 16, 1979, in Salt Lake City, Utah. He was raised in the Salt Lake City area by his father, Mr. James B. Angelos, with only minimal contact with his mother. Mr. Angelos has two young children by Ms. Zandrah Uyan: six-year-old Anthony and five-year-old Jessie. Before his arrest Mr. Angelos had achieved some success in the music industry. He started Extravagant Records, a label that produces rap and hip hop music. He had worked with prominent hip hop musicians, including Snoop Dogg, on the "beats" to various songs and was preparing to record his own album.

The critical events in this case are three "controlled buys" of marijuana by a government informant from Mr. Angelos. On May 10, 2002, Mr. Angelos met with the informant, Ronnie Lazalde, and arranged a sale of marijuana. On

May 21, 2002, Mr. Angelos completed a sale of a eight ounces of marijuana to Lazalde for $350. Lazalde observed Mr. Angelos' Glock pistol by the center console of his car. This drug deal formed the basis for the first § 924(c) count.

During a second controlled buy with Lazalde, on June 4, 2002, Mr. Angelos lifted his pant leg to show him the Glock in an ankle holster. Lazalde again purchased approximately eight ounces of marijuana for $350. This deal formed the basis for the second § 924(c) count.

A third controlled buy occurred on June 18, 2002, with Mr. Angelos again selling Lazalde eight ounces of marijuana for $350. There was no direct evidence of a gun at this transaction, so no § 924(c) count was charged.

On November 15, 2003, police officers arrested Mr. Angelos at his apartment pursuant to a warrant. Mr. Angelos consented to a search. The search revealed a briefcase which contained $18,040, a handgun, and two opiate suckers. Officers also discovered two bags which contained approximately three pounds of marijuana. Officers also recovered two other guns in a locked safe, one of which was confirmed as stolen. Searches at other locations, including the apartment of Mr. Angelos' girlfriend, turned up several duffle bags with marijuana residue, two more guns, and additional cash.

The original indictment issued against Mr. Angelos contained three counts of distribution of marijuana,[1] one § 924(c) count for the firearm at the first controlled buy, and two other lesser charges. Plea negotiations began between the government and Mr. Angelos. On January 20,

[1] 18 U.S.C. § 841(b)(1).

2003, the government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, the government would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time. In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence. Ultimately, Mr. Angelos rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years. The five § 924(c) counts consisted of two counts for the Glock seen at the two controlled buys, one count for three handguns found at his home, and two more counts for the two guns found at the home of Mr. Angelos' girlfriend.

Perhaps recognizing the gravity of the situation, Mr. Angelos tried to reopen plea negotiations, offering to plea to one count of drug distribution, one § 924(c) count, and one money laundering count. The government refused his offer, and the case proceeded to trial. The jury found Mr. Angelos guilty on sixteen counts, including three § 924(c) counts: two counts for the Glock seen at the two controlled buys and a third count for the three handguns at Mr. Angelos' home. The jury found him not guilty on three counts – including the two additional § 924(c) counts for the two guns at his girlfriends' home. (The court dismissed one other minor count.)

Mr. Angelos' sentence is presumptively governed by the Federal Sentencing Guidelines. Under governing Guideline provisions, the bottom line is that all counts but the three § 924(c) counts combine to create a total offense level of 28.[2] Because Mr. Angelos has no significant prior criminal history, he is treated as first-time offender (a criminal history category I) under the Guidelines. The prescribed Guidelines' sentence for Mr. Angelos for everything but the § 924(c) counts is 78 to 97 months.

After the Guideline sentence is imposed, however, the court must then add the § 924(c) counts. Section 924(c) prescribes a five-year mandatory minimum for a first conviction, and 25 years for each subsequent conviction.[3] This means that Mr. Angelos is facing 55 years (660 months) of mandatory time for the § 924(c) convictions. In addition, § 924(c) mandates that these 55 years run consecutively to any other time imposed.[4] As a consequence, the minimum sentence that the court can impose on Mr. Angelos is 61½ years – 6½ years (78 months) for the 13 counts under the Guidelines and 55 consecutive years for the three § 924 convictions. The federal system does not provide the possibility of parole, but instead provides only a modest "good behavior" credit of approximately 15 percent of the sentence. Assuming good behavior, Mr. Angelos' sentence will be reduced to "only" 55 years, meaning he could be released when he is 78 years old.

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[2] Tr. 9/14/04 at 27 (based on U.S.S.G. § 2D1.1(c)(7) & § 2S1.1(b)(2)(B)).

[3] 18 U.S.C. § 924(c)(1)(A)(i) & (C)(i).

[4] 18 U.S.C. § 924(c)(1)(D)(ii).

Mr. Angelos challenges this presumptive sentence on two grounds. His main argument is that § 924(c) is unconstitutional as applied to him, either because the additional 55-year sentence is irrational punishment that violates equal protection principles or is cruel and unusual punishment that violates the Cruel and Unusual Punishment Clause. His other argument is that the 78 to 97 month Guidelines sentence is unconstitutional under *Blakely v. Washington*[5] because a jury did not find the facts underlying the Guidelines calculation. The court will first address his constitutional challenges to § 924(c), then his challenge to the Guidelines sentence.

II. Legislative History and Judicial Interpretation of § 924(c)

Before turning to Mr. Angelos' specific challenges to § 924(c), it is helpful to understand the history of the statute. Title 18 U.S.C. § 924(c) was proposed and enacted in a single day as an amendment to the Gun Control Act of 1968 enacted following the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. Congress intended the Act to address the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime."[6] Because § 924(c) was offered as a floor amendment, there are no congressional hearings or committee reports regarding its original purpose,[7] and the court is left

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[5] ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

[6] H.R.REP. No. 90-1577 at 1698, 90th Cong., 2d Sess., 7 (1968), 1968 U.S.C.C.A.N. 4410, 4412.

[7] *Cf. Jung v. Association of American Medical Colleges*, 339 F.Supp.2d 26, 42-43 (D.D.C.2004) (noting interpretive difficulties created when legislation is passed without legislative hearings).

only with a few statements made during floor debate.[8] For example, Representative Poff, the sponsor of the amendment, stated that the law's purpose was to "persuade the man tempted to commit a Federal felony to leave his gun at home."[9]

As originally enacted, § 924(c) gave judges considerable discretion in sentencing and was not nearly as harsh as it has become. When passed in 1968, § 924(c) imposed an enhancement of "not less than one year nor more than ten years" for the person who "uses a firearm to commit any felony for which he may be prosecuted in a court of the United States" or "carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States."[10] If the person was convicted of a "second or subsequent" violation of § 924(c), the additional penalty was "not less than 2 nor more than 25 years," which could not run "concurrently with any term of imprisonment imposed for the commission of such felony."[11] In the 36 years since its passage, the penalties attached to § 924(c) have been made continually harsher either by judicial interpretation or congressional action.

One of the first questions involving the provision was whether a defendant could be sentenced under § 924(c) where the underlying felony statute already included an enhancement for use of a firearm. In 1972 in *Simpson v.*

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[8] *Busic v. United States*, 446 U.S. 398, 405, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980).

[9] 114 CONG. REC. 22, 231-48 (1968) (Statement of Rep. Poff).

[10] *Simpson v. United States*, 435 U.S. 6, 7-8, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978) (citing 18 U.S.C. § 924(c) (1968)).

[11] *Id.*

United States,[12] the Supreme Court, relying on floor statements from Representative Poff, held that "the purpose of § 924(c) is already served whenever the substantive federal offense provides enhanced punishment for the use of a dangerous weapon" and that "to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(c) would violate the established rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"[13] In 1980 in *Busic v. United States,*[14] the Court reaffirmed its decision in *Simpson* and went one step further, holding that prosecutors could not file a § 924(c) count instead of the enhancement provided for in the underlying federal statute. Supporting its conclusion, the Court noted that in 1971 the Department of Justice had advised prosecutors not to proceed under § 924(c) if the predicate felony statute provided for "'increased penalties where a firearm was used in the commission of the offense.'"[15]

In response to *Simpson* and *Busic,* in 1984 Congress amended § 924(c) "so that its sentencing enhancement would apply regardless of whether the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'"[16] The 1984 amendment also established a five-year

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[12] 435 U.S. 6, 98 S.Ct. 909 (1977).

[13] *Id.* at 13, 14, 98 S.Ct. 909.

[14] 446 U.S. 398, 100 S.Ct. 1747 (1980).

[15] *Id.* at 406, 100 S.Ct. 1747 (quoting 19 U.S. Atty's Bull. No. 3, p. 63 (U.S. Dept. of Justice, 1981)).

[16] *United States v. Gonzales,* 520 U.S. 1, 10, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (citing Comprehensive Crime Control Act of 1984, Pub.L. 98-47. § 1005(a), 98 Stat. 2128-39).

mandatory minimum for use of a firearm during commission of a crime of violence.[17]

In 1986, as part of the Firearms Owner's Protection Act, Congress made § 924(c) specifically applicable to drug-trafficking crimes, and increased the mandatory minimum to ten years for certain types of firearms.[18] In later amendments, Congress increased the penalty for a "second or subsequent" § 924(c) conviction to a mandatory minimum of twenty years (then ultimately to twenty-five years).[19]

The increased penalties for "second or subsequent" § 924(c) convictions produced litigation over whether multiple convictions in the same proceeding were subject to enhanced penalties. In essence, the issue was whether Congress intended § 924(c) to be a true recidivist statute or one that increased penalties for first offenders. Most courts, including the Tenth Circuit, did not apply the twenty-year penalty when the "second" conviction was just the second § 924(c) count in an indictment.[20] But in *Deal v. United States,*[21] the Supreme Court, in a six-to-three decision, construed the statute more broadly. In *Deal,* the defendant was convicted of committing six different bank robberies on six different dates, each time using a gun. He was sentenced to five years for the first § 924(c) charge, and twenty years for each of the other five § 924(c) charges

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[17] *Id.*

[18] Pub.L. No. 99-308, § 104(a)(2)(A)-(F).

[19] Pub.L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

[20] *See, e.g., United States v. Chalan,* 812 F.2d 1302, 1315 (10th Cir.1987), *cert. denied,* 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 565 (1988).

[21] 508 U.S. 129, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993).

– a total of 105 years. In affirming his sentence, the Court held that a "second or subsequent" conviction could arise from a single prosecution.[22] To hold otherwise, the Court noted, would simply encourage prosecutors to file separate charges and try the defendant in separate prosecutions.[23]

Less than two weeks after *Deal,* the Court again interpreted the statute in *Smith v. United States.*[24] In *Smith,* the Court held that exchanging a gun for drugs constitutes "use" of a firearm "during and in relation to . . . [a] drug trafficking crime."[25] The Court rejected the defendant's argument that "use" of a firearm required use as a *weapon.*[26] The majority noted than when Congress enacted the relevant version of § 924(c) it was no doubt responding to concerns that drugs and guns were a "dangerous combination."[27] Justice Scalia argued in dissent that it was "significant" that the portion of § 924(c) relating to drug trafficking was affiliated with the pre-existing provision pertaining to use of a firearm in relation to a crime of violence.[28] He therefore thought that the word "use" in relation to a crime of violence means use as a weapon, and that this definition of use carried over to the addition of drug trafficking to the statute.[29]

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[22] *Id.* at 133-34, 113 S.Ct. 1993.

[23] *Id.* at 134, 113 S.Ct. 1993.

[24] 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993).

[25] *Id.* at 225, 113 S.Ct. 2050.

[26] *Id.* at 228, 113 S.Ct. 2050.

[27] *Id.* at 239, 113 S.Ct. 2050.

[28] *Id.* at 244, 113 S.Ct. 2050 (Scalia J., dissenting).

[29] *Id.*

The Court again interpreted § 924(c) in *United States v. Gonzales*[30] and held that a sentence under § 924(c) could not be served concurrently with an unrelated sentence from a state conviction.[31] Finally, in *Muscarello v. United States,*[32] the Court held that, as used in § 924(c), "carries" is not limited to the felon who carries the firearm on his person, but includes a gun brought to a drug transaction in the glove compartment of his vehicle.

What all this history reveals is that if the original version of § 924(c) governed Mr. Angelos' sentencing, the court could impose three separate one-year enhancements, adding a total of three years to his sentence. However, after 36 years of judicial interpretation and congressional modifications, the court is now left with a version of § 924(c) that requires a sentence of 55 years on top of a tough Guidelines sentence for drug dealing.

III. Mr. Angelos' Equal Protection Challenge to the Statute

Mr. Angelos first contends that 18 U.S.C. § 924(c) makes arbitrary classifications and irrationally treats him far more harshly than criminals guilty of other much more serious crimes. He raises this claim as an equal protection challenge. The court will first set forth the law on such arguments and then turn to the merits of Mr. Angelos' claim.

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[30] 520 U.S. 1, 117 S.Ct. 1032 (1997).

[31] *Id.* at 9-10, 117 S.Ct. 1032.

[32] 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998).

A. Equal Protection Review of Criminal Statutes

1. General Equal Protection Principles

Mr. Angelos can raise an equal protection challenge to classifications created by a federal criminal statute like § 924(c). While the Equal Protection Clause applies only to the states,[33] "[t]he Fifth Amendment's due process clause encompasses equal protection principles."[34] Under equal protection principles, the court's review is quite limited. The Equal Protection Clause "does not enact Mr. Herbert Spencer's *Social Statistics*"[35] or any other personal view of a judge. Instead, unless a law infringes upon a fundamental right or classifies along suspect lines such as race, the court's review is limited to determining whether there is a rational basis for the law.

Mr. Angelos does not argue that his claim is subject to a heightened standard of review. The law is well-settled on the subject.[36] As explained by the Supreme Court:

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[33] U.S. CONST. amend. XIV ("No *State* shall . . . deny to any person with its jurisdiction the equal protection of the laws."), *U.S. v. Lee*, 957 F.2d 778 (10th Cir.1992), *cert. denied*, 506 U.S. 978, 113 S.Ct. 475, 121 L.Ed.2d 381 (1992).

[34] *United States v. Lee*, 957 F.2d 778, 782 (10th Cir.1992) (citing *Mathews v. de Castro*, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976)).

[35] *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J.)

[36] *United States v. McKissick*, 204 F.3d 1282, 1300 (10th Cir.2000) ("We review Mr. Zeigler's equal protection claim regarding the sentencing guidelines under the rational basis standard to determine whether the challenged sentence is based on an arbitrary distinction or upon a rational sentencing scheme.").

> Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. . . . But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual . . . and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. In this context . . . an argument based on equal protection essentially duplicates an argument based on due process.[37]

This holding places on Mr. Angelos a heavy burden of proof. First, "statutory classifications will not be set aside on equal protection grounds if any ground can be conceived to justify them as rationally related to a legitimate government interest."[38] Second, "those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis' which might support it."[39] The government "has no obligation to produce evidence to sustain the rationality of a statutory classification,"[40] nor does Congress have to "'articulate its reasons

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[37] *Chapman v. United States*, 500 U.S. 453, 464-65, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (citations omitted); *see also Baer v. City of Wauwatosa*, 716 F.2d 1117, 1125 (7th Cir.1983) (discrimination against felons subject to rational basis review).

[38] *Lee*, 957 F.2d at 782 citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

[39] *FCC v. Beach Communications, Inc.* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (citations omitted).

[40] *Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

for enacting a statute'"[41] "[U]nder a rational basis analysis, [Congress] need not articulate the precise reasons why it chose to impose different sentences for different crimes; nothing in the Constitution prevents [Congress] from making classifications along non-suspect lines if there is a rational basis for doing so."[42] A statute can be both over-inclusive and under-inclusive and still pass rational basis review.[43] In sum, rational basis review is "a paradigm of judicial restraint" which "presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[44] It is on this basis that the court will proceed.[45]

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[41] *Powers v. Harris,* 379 F.3d 1208, 1217 (10th Cir.2004) (citations omitted).

[42] *Phillips v. Iowa,* 185 F.Supp.2d 992, 1008 (N.D.Iowa 2002).

[43] *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

[44] *Beach Communications, Inc.,* 508 U.S. at 314, 113 S.Ct. 2096.

[45] Mr. Angelos also seeks to raise an "as-applied" challenge to § 924(c)'s rationality. It is not clear whether as-applied challenges are permitted in the context of rationality review. After all, "[n]early any statute which classifies people may be irrational as applied in particular cases." *Beller v. Rumsfeld,* 632 F.2d 788, 808-09, n. 20 (9th Cir.1980). Moreover, statutes subject to rational review can be based on "assumptions" and "generalizations" which "inevitably produce seemingly arbitrary consequences in some individual cases." *Califano v. Jobst,* 434 U.S. 47, 53, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977). These statutes "must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Id.* at 55, 98 S.Ct. 95. Thus, in *Rojas-Reyes v. INS,* 235 F.3d 115 (2d Cir.2000), the court rejected an as-applied challenge because it "misunderstands the nature of rational basis review, in which acts of Congress . . . need not result in the most just or logical result in every case to pass constitutional muster." *Id.* at 123 (citation omitted).

(Continued on following page)

2. The Court's Obligation to Search for a Rational Basis

The Tenth Circuit has also instructed that rational basis review is not limited to the arguments advanced by the parties. In the recent civil case of *Powers v. Harris*[46], the Circuit explained that even if the parties cannot conceive of a rational basis for the statute, the court is "not bound by the parties' arguments" but is "'*obligated* to seek out other conceivable reasons for validating'" the statute.[47] If this understanding of rationality review extends to criminal cases, then a defendant must not only negate all of the proposed grounds for a statute put forth by the government but also any rational basis which the court might conceive.

On the other hand, the Supreme Court and Tenth Circuit have both addressed as-applied challenges under rational basis review without questioning whether the posture of the case was appropriate. *See City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (striking down local zoning ordinance under rational basis review because irrational "as applied in this case"); *Meyer v. Nebraska,* 262 U.S. 390, 403, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (concluding that Nebraska law prohibiting the teaching of German in public schools "as applied is arbitrary"); *United States v. Alahmad,* 211 F.3d 538, 541 (10th Cir.2000) (upholding International Parental Kidnapping Crime Act against as-applied rational basis challenge); *United States v. Doyan,* 909 F.2d 412, 416 (10th Cir.1990) (upholding U.S.S.G. § 5E1.2(i) "as applied here"). In light of these possibly conflicting approaches and the seriousness of the penalties facing Mr. Angelos, the safest and fairest approach here is to give him the benefit of the doubt and consider his as-applied challenge.

[46] 379 F.3d 1208 (10th Cir.2004).

[47] *Id.* at 1217 (quoting *Starlight Sugar, Inc. v. Soto,* 253 F.3d 137, 146 (1st Cir.2001) *cert. denied,* 534 U.S. 1021, 122 S.Ct. 548, 151 L.Ed.2d 424 (2001)).

Such a conclusion in a criminal case, however, is problematic in light of the defendant's due process rights at sentencing. In *Gardner v. Florida*,[48] for example, the Supreme Court, noting that a criminal defendant "has a legitimate interest in the character of the procedure which leads to the imposition of sentence,"[49] held that it was a violation of due process for a trial court to impose the death sentence based partially on confidential information in the pre-sentence report which the defendant did not have a chance to rebut at sentencing. *Gardner* was a death penalty case, and there is some question about whether the due process requirements would apply in a non-capital case.[50] But here we have effectively a sentence of life in prison – the next most serious punishment the law can impose.

The Tenth Circuit has also provided guidance on the procedures to be followed at sentencing hearings. For example, in *United States v. Beaulieu*,[51] the Tenth Circuit held that while a judge may rely on reliable hearsay at the sentencing stage, the due process clause requires that the defendant "be given adequate notice of and an opportunity to rebut or explain information that is used against him" at sentencing.[52]

These due process considerations are the basis for Rule 32(i) of the Federal Rules of Criminal Procedure,

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[48] 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

[49] *Id.* at 357, 97 S.Ct. 1197.

[50] Wayne R. LaFave, et al., CRIMINAL PROCEDURE 1240-41 (4th ed.2004).

[51] 893 F.2d 1177 (10th Cir.1990), *cert. denied*, 497 U.S. 1038, 110 S.Ct. 3302, 111 L.Ed.2d 811 (1990).

[52] *Id.* at 1181.

which requires the court to give the defendant a chance to refute facts in the pre-sentence report.[53] But Rule 32(i) is not limited to factual allegations in the pre-sentence report. Specifically, Rule 32(i)(1)(C) states that the Court must afford counsel for the defendant an opportunity to "comment on the probation officer's determinations *and on other matters relating to the appropriate sentence. . . .*"[54] Similarly, Rule 32(i)(3)(B) requires the court to make findings on any "controverted matters." A matter cannot be "controverted" if it is hypothesized by the judge and the defendant never has an opportunity to comment on it.

Rule 32 has been given an expansive reading by the Supreme Court. In *Burns v. United States,*[55] the Supreme Court considered whether a trial court could depart upwards from a Guidelines sentence *sua sponte* without notice to the defendant or the government. The Court held that Rule 32 requires that the defendant be notified beforehand of the court's intention to depart upward so that he can challenge both the factual and the legal basis for doing so.[56] As *Burns* suggests, for the trial court to reach legal conclusions without first affording notice to the parties would "render [] meaningless the parties' express right under Rule 32(a)(1) to 'comment upon . . . matters relating to the appropriate sentence'" because the right to

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[53] *See, e.g., United States v. Romero,* 122 F.3d 1334, 1344 (10th Cir.1997), *cert. denied,* 523 U.S. 1025, 118 S.Ct. 1310, 140 L.Ed.2d 474 (1998).

[54] FED.R.CRIM.P. 32(c)(1) (emphasis added).

[55] 501 U.S. 129, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991).

[56] *Id.* at 135-136, 111 S.Ct. 2182.

comment upon a departure has "'little reality or worth unless one is informed' that a decision is contemplated."[57]

If the court follows here the approach adopted by the Tenth Circuit in *Powers* for civil cases, it could hold that § 924(c) is constitutional based solely on an argument hypothesized by the court without notice to the defense. Such an approach would clash with the purpose of Rule 32, which is to "promote[] focused, adversarial resolution of the *legal* and factual issues" relevant to fixing a sentence.[58] In *Burns,* the Court explained that allowing *sua sponte* departures would force the parties to hypothesize every potential departure and address them "in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative."[59]

Out of an abundance of caution, therefore, the court concludes that it should not uphold § 924(c) on grounds which the defendant has not had an opportunity to address. In reaching this conclusion, this court in no way intends to deviate from the standard rule that it is not necessary for the government to show the actual reason that Congress enacted a statute, be it civil or criminal.[60] The criminal cases supporting this rule, however, do not stand for the proposition that, in contrast to the ordinary rules of sentencing, the court can advance grounds to

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[57] *Id.* at 136, 111 S.Ct. 2182 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

[58] *Burns,* 501 U.S. at 137, 111 S.Ct. 2182.

[59] *Id.*

[60] *United States v. Lee,* 957 F.2d 778, 782 (10th Cir.1992), *cert. denied,* 506 U.S. 978, 113 S.Ct. 475, 121 L.Ed.2d 381 (1992).

sustain a statute *sua sponte* without giving the defendant a chance to respond.[61]

Finally, the court has considered whether it might be feasible for it to conceive of grounds beyond those raised by the government or the defendant and then give the parties a further opportunity to brief and argue those additional grounds. Practical concerns, however, dictate against such an approach for a criminal sentencing, where the court must impose sentence "without unnecessary delay."[62] Presumably these same concerns were at play in the Tenth Circuit's decision in *Powers*. The Circuit did not call for additional briefing and argument there, probably because of the delay attendant to such a procedure.

In reaching this conclusion, the court does not mean to suggest that there is some clearly "winning" argument that the government has simply failed to raise. The government has been ably represented throughout these proceedings by experienced and capable counsel. The government has briefed and argued the main grounds that can be advanced to sustain § 924(c) as applied in this case. Rather than chase down every hypothetical ground that could sustain the statute, the court will consider the grounds that have been briefed and argued in this case.

B. The Irrationality of § 924(c)

Mr. Angelos contends that § 924(c) effectively sentences him to life in prison and that this statutory scheme

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[61] *See, e.g., id.* at 780 (government raising the grounds used to sustain the statute).

[62] FED. R.CRIM. P. 32(b)(1).

is irrational as applied to him. In particular, Mr. Angelos contends that § 924(c) leads to unjust punishment and creates irrational distinctions between different offenders and different offenses. The court will first review Mr. Angelos' claims about the statute's infirmities, then consider the government's defenses.

1. Mr. Angelos Effectively Receives a Life Sentence Under § 924(c)

Before turning to the merits of Mr. Angelos' claims, it is important to understand the length of the sentence that the government is asking the court to impose. If Angelos serves his full 61½-year sentence, he will be 85 years old upon release. Assuming the 15 percent credit for good behavior, Mr. Angelos sentence will be reduced to "only" 55 years, leading to the earliest possible release date for Mr. Angelos at 77 years of age. The average life expectancy for males in the United States is about 74 years of age.[63] Therefore, under the best case scenario, Angelos *might* live long enough to be released from prison (assuming that the harshness of prison life does not decrease his life expectancy). Put another way, if the court imposes the sentence sought by the government, Mr. Angelos will effectively receive a sentence of life.

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[63] Elizabeth Arias, *United States Life Tables, 2001 in* National Vital Statistics Reports, U.S. Dep't of Health and Human Serv., Vol. 52, No. 14 (Feb. 18, 2004) *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_14.pdf.

2. Unjust Punishment from § 924(c)

Mr. Angelos argues that his sentence is irrational because the enhancement provided for under § 924(c) increases his sentence by 55 years, whereas were the Guidelines alone to be applied, his sentence would be enhanced by only two years. Under the Guidelines, Mr. Angelos' sentence would have been increased by, at most, 24 months.[64] Because the relevant conduct was charged as three separate § 924(c) violations, however, the result was a sentence increased by 660 months, or 55 years. Cases such as this force the government to choose between charging defendants under § 924(c) or relying on the Guidelines' enhancement. As the Eleventh Circuit has noted, "The relationship between § 924(c) and [the Guidelines enhancement] is an 'either/or' relationship at sentencing. If a defendant is convicted [under § 924(c)], he must receive a five year consecutive sentence, but he cannot also have his base offense level enhanced pursuant to [the Guidelines enhancement] because such enhancement would violate the Double Jeopardy Clause of the United States Constitution. However, a defendant who is not convicted of a violation of § 924(c), may receive an enhancement of his base offense level for possession of a firearm in connection with a drug offense."[65] The government in this case chose to pursue § 924(c) counts rather than enhancements under the Guidelines.

The Guidelines, Mr. Angelos argues, reflect the judgment of experts appointed by Congress to determine "just

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[64] § 2D1.1(b)(1) (gun enhancement for drug offenses).

[65] *United States v. Mixon,* 115 F.3d 900, 902 (11th Cir.1997) (citation omitted).

punishment" for federal criminal offenses. Because his sentence, the result of 924(c), is at such discrepancy with the Guidelines determination of "just punishment," Mr. Angelos argues that his sentence is irrational.

In imposing sentences in criminal cases, the court is required by the governing statute – the Sentencing Reform Act[66] – to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the Act]."[67] The purposes of sentencing set forth in the Sentencing Reform Act are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide *just punishment* for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[68]

To give some real content to the Sentencing Reform Act's directives, Congress established an expert body – the United States Sentencing Commission – to promulgate sentencing Guidelines for criminal offenses. The Sentencing Commission, after extensive review of sentencing practices across the country established a comprehensive

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[66] 18 U.S.C. § 3551 et seq.

[67] 18 U.S.C. § 3553(a).

[68] 18 U.S.C. § 3553(a)(2) (emphasis added).

set of sentencing guidelines. The Commission has carefully calibrated the Guidelines through annual amendments, and Congress has had the opportunity to reject and amend Guidelines that were not to its satisfaction.

The Guidelines provide clear guidance on what is just punishment for federal offenses. To be sure, the constitutionality of the fact-finding apparatus attached to the Guidelines is currently under Supreme Court review,[69] and this court has held that in cases such as this one the Guidelines are advisory only.[70] But the substantive content of the Guidelines is what is relevant here. Both sides agree that the Guidelines should be considered as providing guidance on the appropriate penalty. Moreover, Congress has directed that courts must follow the Guidelines in imposing sentence unless some unusual factor justifies a departure.[71] As a result, Congress has in essence instructed the courts that the Guidelines provide "just punishment" for criminal offenses. It could hardly be otherwise, as Congress would not have gone to the trouble of having an expert body promulgate sentencing guidelines if those guidelines failed to prescribe the appropriate sentences. In short, the views of the Sentencing Commission are entitled to "great weight because the Sentencing Commission is the expert body on federal sentencing."[72]

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[69] *See United States v. Booker*, ___ U.S. ___, 125 S.Ct. 11, 159 L.Ed.2d 838 (2004) (granting certiorari to review this question).

[70] *United States v. Croxford*, 324 F.Supp.2d 1230 (D.Utah 2004); *see also* Part V, *infra* (discussing application of *Croxford* to this case).

[71] 18 U.S.C. § 3553(b)(1).

[72] *United States v. Hill*, 48 F.3d 228, 231 (7th Cir.1995); *see also Mistretta v. United States*, 488 U.S. 361, 379, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (noting Commission's status as "an expert body").

In this case, neither side has offered any strong reason for believing that the sentence the Guidelines alone provide for would not achieve just punishment. The Guidelines specify sentences for all crimes covered by the federal criminal code, including all the crimes committed by Mr. Angelos. Setting aside the three firearms offenses covered by the § 924(c) counts, all of Mr. Angelos' other criminal conduct results in an offense level of 28. Because Mr. Angelos is a first-time offender, the Guidelines then specify a sentence of between 78 to 97 months. It is possible to determine, however, what a Guidelines sentence would be covering all of Mr. Angelos conduct, including that covered by the § 924(c) counts. If this conduct were punished under the Guidelines rather than under § 924(c), the result would be an additional two-level enhancement,[73] increasing the offense level from a level 28 to a level 30. This, in turn, produces a recommended Guidelines sentence for Mr. Angelos of 97 to 121 months. Thus, the Guidelines inform the court that Mr. Angelos' possession of firearms should increase his sentence by no more than 24 months (from a maximum of 97 months to a maximum of 121 months). This is a point worth emphasizing: the expert agency established by Congress to evaluate federal sentences and that the court must follow when imposing sentences has specified 24 months as the appropriate enhanced penalty for Mr. Angelos' possession of firearms and no more than 121 months as "just punishment" for all of Mr. Angelos' offenses.

Bearing firmly in mind the conclusion of Congress' expert agency that 121 months is the longest appropriate

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[73] U.S.S.G. § 2D1.1(b)(1).

prison term for all the criminal conduct in this case, it comes as a something of a shock to then consider the § 924(c) counts. Because Mr. Angelos' possession of firearms is punished not under the Guidelines but rather under § 924(c), the court is required to impose an additional penalty of 660 months (55 years) instead of the 24 month enhancement provided for by the Guidelines. It is not at all clear how the court can reconcile these two sentences. Knowing that the congressionally-approved Guidelines provide for an additional 24 month penalty for the firearms at issue, can the court conclude that an additional 660 months is a "just punishment"? One architect of the Guidelines has recognized the problem of the discrepancy:

> The compatibility of the guidelines system and mandatory minimums is also in question. While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. . . . Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if

> the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[74]

There is, of course, the possibility that the Sentencing Guidelines are too low in this case and that mandatory minimums specify the proper sentence. The more the court investigates, however, the more the court finds evidence that the § 924(c) counts here lead to unjust punishment. For starters, the court asked the twelve jurors in this case what they believed was the appropriate punishment for Mr. Angelos. Following the trial, the court sent – over the government's objection – each of the jurors the relevant information about Mr. Angelos' limited criminal history, described the abolition of parole in the federal system, and asked the jurors what they believed was the appropriate penalty for Mr. Angelos. Nine jurors responded and gave the following recommendations: (1) 5 years; (2) 5-7 years; (3) 10 years; (4) 10 years; (5) 15 years; (6) 15 years; (7) 15-20 years; (8) 32 years; and (9) 50 years. Averaging these answers, the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years. Not one of the jurors recommended a sentence closely approaching the 61½ year sentence created by § 924(c).

At oral argument, the court asked the government what it thought about the jurors' recommendations and

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[74] Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System,* 28 WAKE FOREST L.REV. 185, 194 (1993); *see also Neal v. United States,* 516 U.S. 284, 292, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996). *See generally* U.S. SENTENCING COMM., MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS 5-15 (1991) (numbers inserted and justifications reordered) (hereinafter Sentencing Comm. Mandatory Minimum Report).

whether it was appropriate to impose a sentence so much higher than what the jurors thought appropriate. The government's response was quite curious: "Judge, we don't know if that jury is a random representative sample of the citizens of the United States. . . ."[75] Of course, the whole point of the elaborate jury selection procedures used in this case was to assure that the jury was, indeed, such a fair cross section of the population so that the verdict would be accepted with confidence. It is hard to understand why the government would be willing to accept the decision of the jury as to the guilt of the defendant but not as to the length of sentence that might be imposed.

More important, the jurors' answers appear to reflect a representative of what people across the country believe. The crimes committed by Mr. Angelos are not uniquely federal crimes. They could have been prosecuted in state court in Utah or elsewhere across the country. The court asked the Probation Office to determine what the penalty would have been in Utah state court had Mr. Angelos been prosecuted there. The Probation Office reported that Mr. Angelos would likely have been paroled after serving about two to three years in prison. The government gives a substantially similar estimate, reporting that on its understanding of Utah sentencing practices Mr. Angelos would have served about five to seven years in prison.[76] Even taking the higher figure from the government, the § 924(c) counts in this case result in punishment far beyond what Utah's citizens, through its state criminal

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[75] Tr. 9/14/04 at 60.

[76] Government's Resp. Mem. Re: Constitutionality of Mandatory Minimum Sentences Pursuant to 18 U.S.C. § 924(c) at 23 n. 19 (Apr. 8, 2004).

justice system, provides as just punishment for such crimes.

The same conclusion obtains if the comparison is to the sentence that would be imposed in other states. Indeed, the government conceded that Mr. Angelos' federal sentence after application of the § 924(c) counts is more than he would have received in any of the fifty states.[77]

Of course, one way of determining what people across the country believe is to look to the actions of Congress. Congress serves as the nation's elected representatives, so actions taken by Congress presumably reflect the will of the people. The difficulty here is that Congress has taken two actions: (1) it created the Sentencing Commission and (2) adopted § 924(c). As between these two conflicting actions, the sentences prescribed by the Sentencing Commission more closely reflect the views of the country. And, indeed, empirical research has demonstrated that the Sentencing Guidelines generally produce sentences that are at least as harsh as those that the public would wish to see imposed.[78]

In sum, the court is faced with the fact that § 924(c) produces punishment in this case far beyond that called for by the congressionally-created expert agency on sentencing, by the jurors who heard the evidence, by the Utah state system, or by any of the other state systems. If the court is to take seriously the directive that it should impose "just punishment" with its sentences, then it should impose sentences that are viewed as appropriate by

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[77] *Id.* at 23 n. 18.

[78] PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1998).

the citizens of this state and of this country. The court concludes that placing Mr. Angelos in prison for 61½ years is not "just punishment" for his crimes. This factor suggests the irrationality of § 924(c).

3. Irrational Classifications

The next factor the court should consider is Mr. Angelos' argument that § 924(c) creates irrational classifications, between different offenses and different offenders. The court will consider each of these arguments in turn.

a. Classifications Between Offenses

Mr. Angelos contends that his § 924(c) sentence is not only unjust but also irrational when compared to the punishment imposed for other more serious federal crimes. Perhaps realizing where this evaluation will inevitably lead, the government initially argues that any comparison is futile because, as the Supreme Court suggested in its 1980 decision *Rummel v. Estelle,* different "crimes ... implicate other societal interests, making any comparison inherently speculative."[79] At some level, this argument is correct; fine distinctions between the relative severity of some kinds of crimes are hard to make. It is difficult to compare, as *Rummel* points out, the crime of embezzlement of millions of dollars with the crime of taking a small amount of money at gun point.[80]

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[79] *Rummel v. Estelle,* 445 U.S. 263, 282 n. 27, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

[80] *Id.* at 282 n. 27, 100 S.Ct. 1133.

But general comparisons of crimes are possible. Some crimes have, for example, a common denominator that permits comparison. As the Supreme Court clarified three years after *Rummel* in *Solem v. Helm*, "stealing a million dollars is viewed as more serious than stealing a hundred dollars."[81] More important, *Solem* pointed to various factors that can be assessed relatively objectively. In instructing the court to judge the gravity of the offense in the cruel and unusual punishment context, the Court noted that its holding "assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments – just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender."[82] Therefore, in determining whether Congress has created irrational classifications with § 924(c), the court can be guided not by any subjective views on how harshly to punish a particular crime, but rather how the punishment for that crime compares to that imposed for other undoubtedly more serious offenses.

In evaluating the § 924(c) counts, the court starts from the premise that Mr. Angelos committed serious crimes. Trafficking in illegal drugs runs the risk of ruining lives through addiction and the violence that the drug trade spawns. As the government properly argued, when a defendant engages in a drug-trafficking operation and "carries and possesses firearms to aid in that venture, as

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[81] *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

[82] *Id.*

was the case here, the actual threat of violence always exists, even it if does not actually occur."[83] But do any of these general rationales provide a rational basis for punishing the *potential* violence which § 924(c) is meant to deter more harshly than *actual* violence that harms a victim in its wake? In other words, is it rational to punish a person who *might* shoot someone with a gun he carried far more harshly than the person who actually *does* shoot or harm someone?

As applied in this case, the classifications created by § 924(c) are simply irrational. Section 924(c) imposes on Mr. Angelos a sentence 55 years or 660 months. Added to the minimum 78-month Guidelines sentence for a total sentence of 738 months, Mr. Angelos is facing a prison term which more than doubles the sentence of, for example, an aircraft hijacker (293 months),[84] a terrorist who detonates a bomb in a public place (235 months),[85] a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months),[86] a second-degree murderer,[87] or a rapist.[88] Table 1 below sets

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[83] Government's Reply Mem. to Br. of Amici Curiae Re: Constitutionality of Mandatory-Minimum Sentences and to Resp. of Angelos Re: Court Order Inviting Angelos to File Plea Negotiation History at 13 (September 10, 2004).

[84] U.S.S.G. § 2A5.1 (2003) (base offense level 38). The 2003 Guidelines are used in all calculations in this opinion. All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I.

[85] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

[86] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[87] U.S.S.G. § 2A1.2 (base offense level 33).

[88] U.S.S.G. § 2A3.1 (base offense level 27).

out these and other examples of shorter sentences for crimes far more serious than Mr. Angelos'.

Table I
Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes

Offense and Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of major drug trafficking ring in which death resulted U.S.S.G. § 2D1.1(a)(2)	Base Offense Level 38	293 Months
Aircraft hijacker U.S.S.G. § 2A5.1	Base Offense Level 38	293 Months
Terrorist who detonates a bomb in a public place intending to kill a bystander U.S.S.G. § 2K1.4(a)(1)	Total Level 36 (by cross reference to § 2A2.1(a)(2) and terrorist enhancement in § 3A1.4(a))	235 Months
Racist who attacks a minority with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)(1)	Base Level 28 + 4 for life threatening + 3 for racial selection under § 3A1.1	210 Months
Spy who gathers top secret information U.S.S.G. § 2M3.2(a)(1)	Base Offense Level 35	210 Months
Second-degree murderer U.S.S.G. § 2A1.2	Base Offense Level 33	168 Months
Criminal who assaults with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)	Base Offense Level 28 + 4 for intent to kill = 32	151 Months
Kidnapper U.S.S.G. § 2A4.1(a)	Base Offense Level 32	151 Months

Saboteur who destroys military materials U.S.S.G. § 2M2.1(a)	Base Offense Level 32	151 Months
Marijuana dealer who shoots an innocent person during drug transaction U.S.S.G. § 2D1.1(c)(13) & (b)(2)	Base Offense Level 16 + 1 § 924(c) count	146 Months
Rapist of a 10-year-old child U.S.S.G. § 2A3.1(a) & (B)(4)(2)(A)	Base Offense Level 27 + 4 for young child = 31	135 Months
Child pornographer who photographs a 12-year-old in sexual positions U.S.S.G. § 2G2.1(a) & (b)	Base Offense Level 27 + 2 for young child = 29	108 Months
Criminal who provides weapons to support a foreign terrorist organization U.S.S.G. § 2M5.3(a) & (b)	Base Offense Level 26 + 2 for weapons = 28	97 Months
Criminal who detonates a bomb in an aircraft U.S.S.G. § 2K1.4(a)(1)	By cross reference to § 2A2.1(a)(1)	97 Months
Rapist U.S.S.G. § 2A3.1	Base Offense Level 27	87 Months

The court provided these examples to the government well before the argument in this case, and invited the government to provide any corrections or additions. No changes were suggested. At oral argument, to its credit, the government conceded that at least some of the crimes in the table involved crimes more serious than those committed by Mr. Angelos. Thus, the government agreed (after extensive questioning from the court) that Mr. Angelos has committed less serious crimes than a second-degree murderer,[89] a marijuana dealer who shoots someone,[90] or a

[89] Tr. 9/14/2004 at 66.

rapist.[91] The government maintained, however, that the court was not making the proper comparison. Because Mr. Angelos was convicted of three counts of violating § 924(c), the government argued, the proper comparison is between Mr. Angelos and a three-time hijacker, a three-time rapist, or a three-time second degree murderer. The government maintains that "the hijacker and kidnapper would serve much longer sentences if they were sentenced for committing those crimes three separate times."[92]

The government's argument misses the whole point of the comparison. All of Mr. Angelos' crimes taken together are less serious than, for example, even a single aircraft hijacking, a single second-degree murder, or a single rape. But even adopting the government's approach, the irrationality of the scheme only becomes more apparent. Amazingly, Mr. Angelos' sentence under § 924(c) is still far more severe than criminals who committed, for example,

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[90] *Id.* at 55.

[91] *Id.* at 67.

[92] Government's Resp. Mem. Re: Constitutionality of Mandatory Minimum Sentences Pursuant to 18 U.S.C. § 924(c) at 20 (Apr. 8, 2004).

On a less serious note, the court agrees with the government on a subsidiary lexicographical point – that "kidnapper" is properly spelled with two *p's* rather than one. The court acknowledges the contrary argument of Judge Boyce, who argues for the single *p* spelling. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 229 (1982). The court, however, finds persuasive the arguments of the nation's leading legal stylist – Bryan Garner – who notes (among other arguments) that a double *p* is used about five to ten times as often as a single *p*. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 494 (2d ed.1995). Moreover, in this case, both Congress (*see* 18 U.S.C. § 1201) and the Sentencing Commission (*see* U.S.S.G. § 2A4.1) have used the double *p* spelling. Finally, while the Tenth Circuit has used both versions, it seems to prefer the double *p*. *See, e.g., United States v. Wooten*, 377 F.3d 1134 (10th Cir.2004) (using kidnapping).

three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes. Table II reflects a trebling of all the crimes in Table I. Mr. Angelos will receive a longer sentence than any three-time criminal, with the sole exception of a marijuana dealer who shoots three people. (Mr. Angelos still receives a longer sentence than a marijuana dealer who shoots two people.)

Table II
Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes Committed Three Times

Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of three major drug trafficking rings in which three deaths resulted	Base Offense Level 38 + 3 units = 41	465 Months
Three-time aircraft hijacker	Base Offense Level 38 + 3 units = 41	405 Months
Terrorist who detonates three bomb in public places intending to kill a bystander	Total Offense Level 35 + 3 units = 38	293 Months
Racist who attacks three minorities with the intent to kill	Total Offense Level 29 + 3 units = 32	151 Months
Spy who gathers top secret information three times	Base Offense Level 35 + 3 units = 38	293 Months
Second-degree murderer of three victims	Base Offense Level 33 + 3 units = 36	235 Months
Criminal who assaults three people with the intent to kill	Total Offense Level 32 + 3 units = 35	210 Months
Kidnapper of three persons	Total Offense Level 32 + 3 units = 35	210 Months

Saboteur who destroys military materials three times	Base Offense Level 32 + 3 units = 35	210 Months
Marijuana dealer who shoots three innocent persons during three drug transactions	Base Offense Level 16 + 3 § 924(c) counts	813 Months
Rapist of three 10-year-old children	Total Offense Level 31 + 3 units = 34	188 Months
Child pornographer who photographs three 12-year-old children in sexual positions	Total Offense Level 29 + 3 units = 32	151 Months
Criminal who provides weapons to support three foreign terrorist organizations	Total Offense Level 263 counts grouped under § 3D1.2(b)	78 Months
Criminal who detonates three bombs in three aircraft	Total Offense Level 28 + 3 units = 31 (by cross reference to § 2A2.1(a)(1)) (3 counts)	135 Months
Rapist who rapes three victims	Total Offense Level 27 + 3 units = 30	121 Months

The irrationality of these differences is manifest and can be objectively proven. In the Eighth Amendment context, the Supreme Court has instructed that "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender."[93] In contrast to the serious violent felonies listed in tables I and II, the crimes committed by Mr.

[93] *Harmelin v. Michigan*, 501 U.S. 957, 1004, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy J., concurring).

Angelos had the *potential* for violence, but no *actual* violence occurred. This is not to say that trafficking in illegal drugs is somehow a non-violent offense. Indeed, in *Harmelin,* Justice Kennedy quite properly called such an assertion "false to the point of absurdity."[94] *Harmelin* involved the potential distribution of approximately 32,500 doses of cocaine, a highly addictive drug that was linked to many of the homicides in Detroit.[95] Justice Kennedy's concurrence equated the crime in *Harmelin* with "felony murder without specific intent to kill."[96]

In this case, however, Mr. Angelos will be completely punished for his marijuana trafficking by the 78-97 month Guidelines sentence he receives. The § 924(c) counts pile on an additional 55 years *solely* for three offenses of possessing firearms in connection with that trafficking. He receives a five-year and then another twenty-five-year sentence for counts 2 and 4, which involved carrying a gun in an ankle holster during a drug deal with one other person for several hundred dollars in marijuana. He receives another twenty-five-year sentence for Count 10, which involved three handguns found in Angelos' apartment during the execution of a search warrant. Section 924(c) punishes Angelos more harshly for crimes that threaten potential violence than for crimes that conclude in actual violence to victims (e.g., aircraft hijacking, second-degree murder, racist assaults, kidnapping, and rape). This factor, therefore, also suggests the irrationality of § 924(c).

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[94] *Id.* at 1002, 111 S.Ct. 2680 (Kennedy J., concurring).

[95] *Id.* at 1002-03, 111 S.Ct. 2680 (Kennedy, J., concurring).

[96] *Id.* at 1004, 111 S.Ct. 2680 (Kennedy, J., concurring).

b. Irrational Classifications Between Offenders

Mr. Angelos also argues that § 924(c) is irrational in failing to distinguish between the recidivist and the first-time offender. Section 924(c) increases penalties for a "second or subsequent conviction under this subsection."[97] This language can be interpreted in two different ways. One construction would be that an offender who is convicted of a § 924(c) violation, serves his time, and then commits a subsequent violation is subject to an enhanced penalty. This was the construction that the Tenth Circuit (among other courts) originally gave to the statute.[98]

Another, far more expansive construction would be that an offender who is convicted of two or more counts is subject to an enhanced penalty for each count after the first count of conviction. In 1993 in *Deal v. United States,*[99] the Supreme Court adopted this second construction, reading the "second or subsequent" language in § 924(c) to apply equally to the recidivist who is convicted of violating § 924(c) on separate occasions after serving prison time and to the defendant who is convicted of multiple § 924(c) counts in the same proceeding stemming from a single indictment. The Court concluded (over the dissents of three Justices) that the unambiguous phrase "subsequent conviction" in the statute permitted no distinction between the time at which the convictions took place.[100] In addition,

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[97] 18 U.S.C. § 924(c)(1).

[98] *United States v. Abreu,* 962 F.2d 1447, 1450 (10th Cir.1992) (en banc) *cert. granted, judg. vacated,* 508 U.S. 935, 113 S.Ct. 2405, 124 L.Ed.2d 630 (1993)).

[99] 508 U.S. 129, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993).

[100] *Id.* at 132-33, 113 S.Ct. 1993.

all time imposed for each § 924(c) count must run consecutively to any other sentence.[101] This is what is known as "count stacking."

When multiple § 924(c) counts are stacked on top of each other, they produce lengthy sentences that fail to distinguish between first offenders (like Mr. Angelos) and recidivist offenders. As John R. Steer, Vice Chair of the United States Sentencing Commission, has explained:

> [C]onsider the effects if prosecutors pursued every possible count of 18 U.S.C. § 924(c). . . . The statute provides for minimum consecutive sentence enhancements of 25 years to life for the second and subsequent conviction under the statute, even if all the counts are charged, convicted, and sentenced at the same time. Pursuing multiple § 924(c) charges at the same time has been called "count stacking" and has resulted in sentences of life imprisonment (or aggregate sentences for a term of years far exceeding life expectancy) for some offenders with little or no criminal history.[102]

Consider the way in which the § 924(c) counts stack up on Mr. Angelos. He is currently 24 years old. He is to receive at least 78 months for the underlying offenses. Stacked on top of this is another 5 years for the first § 924(c) conviction. Stacked on top of this is another 25 years for the second § 924(c) conviction. And finally, another 25 years is stacked on top for the third § 924(c)

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[101] 18 U.S.C. § 924(c)(1)(D)(ii).

[102] Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm'n Before the ABA Justice Kennedy Comm'n 19 (Nov. 13, 2003).

conviction. Even assuming credit for good time served, Mr. Angelos will be more than 55-years-old before he even begins to serve the final 25 years his sentence. This happens not because Mr. Angelos "failed to learn his lessons from the initial punishment" and committed a repeat offense. Section 924(c) jumps from a five-year mandatory sentence for a first violation to a 25-year mandatory sentence for a second violation, which may occur just days (or even hours) later. It is not a recidivist provision.

Other true recidivist statutes do not operate this way. Instead, they graduate punishment (albeit only roughly) between first offenders and subsequent offenders. California's tough three-strikes-and-you're-out law can serve as a convenient illustration. Prompted by violence from career criminals who had been in prison and released,[103] California passed a law requiring lengthy prison terms for third-time offenders, even where the third offense could be viewed as relatively minor. Last year in *Ewing v. California,*[104] the Supreme Court upheld a twenty-five to life sentence under California's three-strikes law. While defendant Ewing's third offense was merely stealing $399 worth of golf equipment, the controlling opinion noted that the policy of the law was to "incapacitat[e] and deter[] repeat offenders who threaten the public safety. The law was designed 'to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent

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[103] *See generally* MIKE REYNOLDS & BILL JONES, THREE STRIKES AND YOU'RE OUT . . . A PROMISE TO KIMBER: THE CHRONICLE OF AMERICA'S TOUGHEST ANTI-CRIME LAW (1996).

[104] 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003).

felony offenses.'"[105] In the end, the Court concluded that Ewing's sentence was justified "by his own long, serious criminal record [including] numerous misdemeanor and felony offenses . . . nine separate terms of incarceration . . . and crimes [committed] while on probation or parole."[106]

Similarly, in the earlier case of *Rummel*[107], the Court saw a critical distinction between first and repeat offenders. In that case, the defendant was convicted of a third felony for obtaining $120 by false pretenses and was sentenced to mandatory life imprisonment under a recidivist statute. The Court found it important to examine the "exact operation" of the statute at issue and found three important factors suggesting a legitimate basis for such a harsh punishment:

First, [Rummel] had to be convicted of a felony and actually sentenced to prison. Second, at some time subsequent to his first conviction, Rummel had to be convicted of another felony and again sentenced to imprisonment. Finally, after having been sent to prison a second time, Rummel had to be convicted of a third felony. . . . Given this necessary sequence, *a recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released.* One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail.[108]

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[105] *Id.* at 15, 123 S.Ct. 1179 (O'Connor, J.) (quoting Cal.Penal Code Ann. § 667(b)).

[106] *Id.* at 30, 123 S.Ct. 1179.

[107] 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

[108] 445 U.S. at 278, 100 S.Ct. 1133 (emphasis added).

While some might raise theoretical objections to such recidivist statutes,[109] their underlying logic is clear and unassailable. But no such logic can justify § 924(c), at least when applied to first offenders such as Mr. Angelos. In cases such as his, the statute blindly draws no distinction between recidivists and first-time offenders. For this reason as well, the statute appears to be irrational as applied in this case.

The irrationality only increases when section § 924(c) is compared to the federal "three strikes" provision. Criminals with two prior violent felony convictions who commit a third such offense are subject to "mandatory" life imprisonment under 18 U.S.C. § 3559(c) – the federal "three-strikes" law. But then under 18 U.S.C. § 3582(c)(1) – commonly known as the "compassionate release" provision – these criminals can be released at age 70 if they have served 30 years in prison. But because this compassionate release provision applies to sentences imposed under § 3559(c) – not § 924(c) – offenders like Mr. Angelos are not eligible. Thus, while the 24-year-old Mr. Angelos must serve time until he is well into his 70's, a 40-year-old recidivist criminal who commits second degree murder, hijacks an aircraft, or rapes a child is potentially eligible for release at age 70. In other words, mandatory life imprisonment under the federal three-strikes law for persons guilty of three violent felony convictions is less mandatory than mandatory time imposed on the first-time offender under § 924(c). Again, the rationality of this arrangement is dubious.

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[109] *See, e.g.*, Markus Dirk Dubber, Recidivist Statutes as Arational Punishment, 43 BUFF. L.REV. 689 (1996).

This possibility, too, is no mere hypothetical. This morning, the court had before it for sentencing Thomas Ray Gurule.[110] Mr. Gurule is 54-years-old with a lifelong history of criminal activity and drug abuse. He has spent more of his life incarcerated than he has in the community. He has sixteen adult criminal convictions on his record, including two robbery convictions involving dangerous weapons. His most recent conviction was for carjacking. In August 2003, after failing to pay for gas at a service station, Mr. Gurule was pursued by the station manager. To escape, Mr. Gurule broke into the home of a young woman, held her at knife point, stole her jewelry, and forced her to drive him away from the scene of his crimes. During the drive, Mr. Gurule threatened both the woman and her family.

For this serious offense – the latest in a long string of crimes for which he has been convicted – the court must apparently sentence Mr. Gurule to "life" in prison under 18 U.S.C. § 3559(c). But because of the compassionate release provision, Mr. Gurule is eligible for release after serving 30-years of his sentence. Why Mr. Gurule, a career criminal, should be eligible for this compassionate release while Mr. Angelos is not obvious to the court.

4. Demeaning Victims of Actual Violence and Creating the Risk of Backlash

For the reasons outlined in the previous section, § 924(c) imposes unjust punishment and creates irrational classifications between different offenses and different offenders. To some, this may seem like a law professor's

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[110] *United States v. Gurule*, No. 2:04-CR-209-PGC.

argument – one that may have some validity in the classroom but little salience in the real world. After all, the only issue in this case is the extent of punishment for a man justly convicted of serious drug trafficking offenses. So what, some may say, if he spends more years in prison than might be theoretically justified? It is common wisdom that "if you can't do the time, don't do the crime."

The problem with this simplistic position is that it overlooks other interests that are inevitably involved in the imposition of a criminal sentence. For example, crime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract "war on drugs."

This is no mere academic point, as a case from this court's docket will illustrate. Earlier today, shortly before Mr. Angelos' hearing, the court imposed sentence in *United States v. Visinaiz,* 344 F.Supp.2d 1310 (D.Utah 2004), a second-degree murder case.[111] There, a jury convicted Cruz Joaquin Visinaiz of second-degree murder in the death of 68-year-old Clara Jenkins. On one evening, while drinking together, the two got into an argument. Ms. Jenkins threw an empty bottle at Mr. Visinaiz, who then proceeded to beat her to death by striking her in the head at least three times with a log. Mr. Visinaiz then hid the body in a crawl space of his home, later dumping the body in a river weighted down with cement blocks. Following his conviction for

[111] *United States v. Visinaiz,* 344 F.Supp.2d 1310.

second-degree murder, Mr. Visinaiz came before the court as a first-time offender for sentencing. The Sentencing Guidelines require a sentence for this brutal second-degree murder of between 210 to 262 months.[112] The government called this an "aggravated second-degree murder" and recommended a sentence of 262 months. The court followed that recommendation. Yet on the same day, the court is to impose a sentence of 738 months for a first-time drug dealer who carried a gun to several drug deals!? The victim's family in the Visinaiz case – not to mention victims of a vast array of other violent crimes – can be forgiven if they think that the federal criminal justice system minimizes their losses. No doubt § 924(c) is motivated by the best of intentions – to prevent criminal victimization. But the statute pursues that goal in a way that effectively sends a message to victims of actual criminal violence that their suffering is not fully considered by the system.

Another reason for concern is that the unjust penalties imposed by § 924(c) can be expected to attract public notice. As shown earlier, applying § 924(c) to cases such as this one leads to sentences far in excess of what the public believes is appropriate. Perhaps in the short term, no ill effects will come from the difference between public expectations and actual sentences. But in the longer term, the federal criminal justice system will suffer. Most seriously, jurors may stop voting to convict drug dealers in federal criminal prosecutions if they are aware that unjust punishment may follow. It only takes a single juror who is

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[112] U.S.S.G. § 2A1.2 (offense level of 33) + § 3A1.1(b) (two-level increase for vulnerable victim) + § 3C1.1 (two-level increase for obstruction of justice).

worried about unjust sentencing to "hang" a jury and prevent a conviction. This is not an abstract concern. In the case of *United States v. Molina*[113] the jury failed to reach a verdict on a § 924(c) count which would have added 30 years to the defendant's sentence. Judge Weinstein, commenting on "the dubious state of our criminal sentencing law"[114] noted that "[j]ury nullification of sentences deemed too harsh is increasingly reflected in refusals to convict."[115] In the last several drug trials before this court, jurors have privately expressed considerable concern after their verdicts about what sentences might be imposed. If federal juries are to continue to convict the guilty, those juries must have confidence that just punishment will follow from their verdicts.

C. Justifications for § 924(c)

Given these many problems with § 924(c) as applied to this case – its imposition of unjust punishment, its irrational classifications between offenses and offenders, and its demeaning of victims of actual criminal violence – what can be said on behalf of the statute? The Sentencing Commission has catalogued the six rationales that are said to undergird mandatory sentencing schemes such as § 924(c):

> (1) Assuring "just" (i.e. appropriately severe) punishment, (2) elimination of sentence disparities, (3) judicial economies resulting from increased pressure on defendants to plead guilty,

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[113] 963 F.Supp. 213 (E.D.N.Y.1997).

[114] *Id.* at 213.

[115] *Id.* at 214.

> (4) stronger inducements for knowledgeable offenders to cooperate in the investigation of others, (5) more effective deterrence, and (6) more effective incapacitation of the serious offender.[116]

These six justifications potentially apply to § 924(c), and the court will consider them as they are advanced by the government.

In its skillfully-argued defense of the § 924(c) sentence here, the government does not rely on the first rationale – the "just punishment" rationale – presumably because the sentence to be imposed on Mr. Angelos appears to be unjust by any reasonable objective measure.

Nor does the government advance the second rationale: that § 924(c) eliminates sentence disparities. Again, the reasons are easy to see. Section 924(c) displaces a carefully-developed sentencing guideline system that would assure that Mr. Angelos receives equal punishment with other similarly-placed offenders. Indeed, § 924(c) creates the potential for tremendous sentencing disparity if federal prosecutors across the country do not uniformly charge § 924(c) violations. Such concerns are founded in real world data. In 1991, the Sentencing Commission found that only about 45 percent of drug offenders who qualified for a § 924(c) enhancement were initially charged under the statute, and for 26 percent of these offenders the counts were later dismissed.[117] In 1995, the Commission again found that only a minority of qualified offenders – between 24 and 44 percent – were convicted and sentenced

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[116] SENTENCING COMM. MANDATORY MINIMUM REPORT, *supra*, at 5-15.

[117] *See* SENTENCING COMM. MANDATORY MINIMUM REPORT at 57-58.

for applicable § 924(c)'s.[118] Again in 2000, the Commission found a pattern of inconsistent application. Only between 10 and 30 percent of drug offenders who personally used, carried, or possessed a weapon in furtherance of a crime received the statutory enhancement.[119]

The Justice Department has recently taken partial steps to reduce charging disparities stemming from § 924(c). A directive from the Attorney General – the so-called "Ashcroft Memorandum" – requires that prosecutors shall file the first readily provable § 924(c) count and a second count in certain circumstances:

> (i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued.
>
> (ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are *crimes of violence,* federal prosecutors shall, in all but exceptional cases, charge and pursue the first *two* such violations.[120]

As applied to the facts of this case, the Ashcroft Memorandum seems only to highlight the problem of disparity rather than resolve it. First, when three or more

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[118] *See* Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement,* 37 AM.CRIM. L.REV. 41 (2000).

[119] Statement of John R. Steer to the ABA Justice Kennedy Commission, *supra,* at 17.

[120] Mem. to All Federal Prosecutors from A.G. John Ashcroft Re: Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing at 4 (Sept. 22, 2003) (emphases added).

violations of § 924(c) are involved, the directive requires federal prosecutors to "pursue the first *two* violations." In this case, the prosecutors pursued *five* violations, ultimately obtaining convictions on *three*. It seems likely that the prosecutors' charging decisions in this case would not have been replicated in other parts of the country. Second, the directive requires federal prosecutors to pursue at least two § 924(c) counts when the predicate offenses are "crimes of violence." Here, the predicates were drug crimes, which the directive does not discuss. Thus, the directive offers no guidance as to whether the prosecutors handling this case should have pursued multiple § 924(c) counts and, if so, how many.

There is also a lack of guidance to federal agents investigating these crimes. In this case, for example, the government did not arrest Mr. Angelos immediately after the first "controlled buy," but instead arranged two more such buys, which then produced one of the additional § 924(c) counts. It is not clear to the court that other law enforcement agents would have allowed Mr. Angelos to continue to deal drugs after the first buy rather than taking him into custody immediately. Of course, one of the rationales for the "stacking" feature of § 924(c) is that each additional criminal act demonstrates need for further deterrence. In this case, though, the additional criminal acts were in some sense procured by the government.

Because of the lack of guidance on these prosecutory and investigative issues, Mr. Angelos is probably receiving a sentence far in excess of what many other identically-situated offenders will receive for identical crimes in other federal districts. The court has been advised by judges from other parts of the country that, in their districts, an offender like Mr. Angelos would not have been charged

with multiple § 924(c) counts. This is no trivial matter. The decision to pursue, for example, a third § 924(c) count in this case makes the difference between a 36-year-sentence and 61-year sentence. In short, § 924(c) as applied in this case seems to create the serious risk of massive sentencing disparity between identically-situated offenders within the federal system. And the problem of disparity only worsens if we acknowledge the fact that Mr. Angelos would not have been charged with federal crimes in many other states. For all these reasons, the government could not plausibly defend § 924(c) on an eliminating-disparity rationale.

The government has also not advanced the third rationale – judicial economies resulting from increased pressure on defendants to plead guilty. Here again, it is possible to understand the government's reluctance. While it is constitutionally permissible for the government to threaten to file enhanced charges against a defendant who fails to plead guilty,[121] there is always the nagging suspicion that the practice is unseemly. In this case, for example, the government initially offered Mr. Angelos a plea bargain in which he would receive a fifteen-year-sentence under one § 924(c) count. When he had the temerity to decline, the government filed superseding indictments adding four additional § 924(c) counts. So far as the court can determine, the superceding indictment rested not on any newly-discovered evidenced but rather solely on the defendant's unwillingness to plead guilty. Moreover, if its plea-inducing properties justify § 924(c), then it is important to understand who will be induced to plead. Section

[121] *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

924(c) will not visit its harsh punishment "on flagrantly guilty repeat offenders (who avoid the mandatory by their guilty pleas), but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial)."[122] For all these reasons, it is understandable that the government would not want to publicly defend § 924(c) with the plea-inducing argument, even though given the realities of overworked prosecutors this may provide a true justification for the statute. Nor has the government argued that § 924(c) is needed to provide incentives for drug traffickers to inform on others in their organization.[123] Instead, the rationale advanced by government is deterrence and incapacitation: the draconian provisions of § 924(c) are necessary to deter drug dealers from committing crimes with those firearms and to prevent Mr. Angelos from doing so in the future.

The deterrence argument rests on a strong intuitive logic. Sending a message to drug dealers that they will serve additional time in prison if they are caught with firearms may lead some to avoid firearms entirely and others to leave their firearms at home. The Supreme Court has specifically noted "the deterrence rationale of § 924(c),"[124] explaining that a fundamental purpose behind § 924(c) was to combat the dangerous combination of drugs and firearms.[125] Congress is certainly entitled to legislate based

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[122] Stephen J. Schullhofer, *Rethinking Mandatory Minimums,* 28 WAKE FOREST L.REV. 199, 203 (1993).

[123] *Cf.* Jay Apperson, *The Lock-'em Up Debate: What Prosecutors Know: Mandatory Minimums Work,* WASH. POST, Feb. 27, 1994 at C1.

[124] *Simpson,* 435 U.S. at 14, 98 S.Ct. 909.

[125] *Smith v. United States,* 508 U.S. 223, 240, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993).

on the belief that § 924(c) will "persuade the man tempted to commit a Federal felony to leave his gun at home."[126]

Congress' belief is, moreover, supported by empirical evidence. Generally criminologists believe that an increase in prison populations will reduce crime through both a deterrent and incapacitative effect. The consensus view appears to be that each 10% increase in the prison population produces about a 1% to 3% decrease in serious crimes.[127] For example, one recent study concluded that California's three strikes law prevented 8 murders, 4000 aggravated assaults, 10,000 robberies, and 400,000 burglaries in its first two years of operation.[128] One study found that Congress' financial incentives to states to which (like the federal system) force violent offenders to serve 85% of their sentences decreased murders by 16%, aggravated assaults by 12%, robberies by 24%, rapes by 12%, and larcenies by 3%. While offenders "substituted" into less harmful property crimes, the overall reduction in crime was significant.[129] While no specific study has examined § 924(c), it is reasonable to assume – and Congress is entitled to assume – that it has prevented some serious drug and firearms offenses.

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[126] 114 CONG. REC. 22, 231-48 (1968) (Statement of Rep. Poff).

[127] *See, e.g.,* Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation,* 111 Q.J. ECON. 319 (1996); James Q. Wilson, *Prisons in a Free Society,* 117 PUB. INTEREST 37, 38 (1998).

[128] *See, e.g.,* Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation,* 31 J. LEGAL STUD. 159 (2002).

[129] Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws,* 45 J.L. & ECON. 509 (2002).

The problem with the deterrence argument, however, is that it proves too much. A statute that provides mandatory life sentences for jaywalking or petty theft would, no doubt, deter those offenses. But it would be hard to view such hypothetical statutes as resting on rational premises. Moreover, a mandatory life sentence for petty theft, for example, would raise the question of why such penalties were not in place for aircraft hijacking, second-degree murder, rape, and other serious crimes. Finally, deterrence comes at a price. Given that holding a person in federal prison costs about $23,000 per year,[130] the 61-year-sentence the court is being asked to impose in this case will cost the taxpayers (even assuming Mr. Angelos receives good time credit and serves "only" 55-years) about $1,265,000. Spending more than a million dollars to incarcerate Mr. Angelos will prevent future crimes by him and may well deter some others from being involved with drugs and guns. But that money could also be spent on other law enforcement or social programs that in all likelihood would produce greater reductions in crime and victimization.[131]

If the court were to evaluate these competing tradeoffs, it would conclude that stacking § 924(c) counts on top of each other for first-time drug offenders who have merely possessed firearms is not a cost-effective way of obtaining deterrence. It is not enough to simply be "tough" on crime. Given limited resources in our society, we also have to be

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[130] MEMORANDUM TO ALL CHIEF PROBATION OFFICERS FROM THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS REGARDING COSTS OF INCARCERATION AND SUPERVISION (March 31, 2004).

[131] *See* John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27J. LEGAL STUD. 1 (1998).

"smart" in the way we allocate our resources. But these tradeoffs are the subject of reasonable debate. It is not the proper business of the court to second-guess the congressional judgment that § 924(c) is a wise investment of resources. Instead, in conducting rational basis review of the statute, the court is only to determine whether "any ground can be conceived to justify [the statutory scheme] as rationally related to a legitimate government interest."[132] "Where there are 'plausible reasons' for Congress' action, [the court's] inquiry is at an end."[133] In *Busic* referring to *Simpson,* the Supreme Court recognized that § 924(c) could lead to "seemingly unreasonable comparative sentences" but that "[i]f corrective action is needed it is the Congress that must provide it. It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated."[134] The Court further noted that "in our constitutional system the commitment to separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'commonsense and the public weal.' "[135]

Accordingly, the court reluctantly concludes that § 924(c) survives rational basis scrutiny. While it imposes unjust punishment and creates irrational classifications, there is a "plausible reason" for Congress' action. As a result, this court's obligation is to follow the law and to

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[132] *Lee,* 957 F.2d at 782 citing *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

[133] *Beach Communications,* 508 U.S. at 313-14, 113 S.Ct. 2096.

[134] *Busic,* 446 U.S. at 405, 100 S.Ct. 1747 citing *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

[135] *Id.* at 410, 100 S.Ct. 1747.

reject Mr. Angelos' equal protection challenge to the statute.

IV. Cruel and Unusual Punishment

In addition to raising an equal protection argument, Mr. Angelos also argues that his 55-year sentence under § 924(c) violates the Eighth Amendment's prohibition of cruel and unusual punishment. In this argument, he is joined in an *amicus* brief filed by a distinguished group of 29 former United States District Judges, United States Circuit Court Judges, and United States Attorneys,[136] who draw on their expertise in federal criminal law and federal sentencing issues to urge that the sentence is unconstitutional as disproportionate to the offenses at hand.

Mr. Angelos and his supporting *amici* are correct in urging that controlling Eighth Amendment case law places an outer limit on punishments that can be imposed for criminal offenses, forbidding penalties that are grossly disproportionate to any offense. This principle traces its roots to the Supreme Court's 1983 decision in *Solem v. Helm,*[137] in which the Supreme Court seemed to modify its earlier holding in *Rummel v. Estelle*[138] and "h[e]ld as a

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[136] Buck Buchanan, Zachary W. Carter, Robert J. Cindrich, Robert J. Cleary, Veronica F. Coleman-Davis, Robert J. Del Tufo, W. Thomas Dillard, John J. Gibbons, Saul A. Green, J. Alan Johnson, James E. Johnson, Gaynelle Griffin Jones, Nathaniel R. Jones, Nicholas Katzenbach, Timothy K. Lewis, Andrew J. Maloney, John S. Martin Jr., William A. Norris, Denise E. O'Donnell, Stephen M. Orlofsky, A. John Pappalardo, James G. Richmond, Benito Romano, Stanley J. Roszkowski, Herbert J. Stern, Harold R. Tyler Jr., Ronald Woods, Sharon J. Zealey, Donald E. Ziegler.

[137] 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

[138] 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[139] The principles of *Solem* were themselves seemingly modified by the Court's fractured 1991 decision in *Harmelin v. Michigan,*[140] in which the Court held that imposition of a life sentence without possibility of parole for possession of 650 grams of cocaine did not violate the Eighth Amendment. Then, last year, the Supreme Court confirmed that the gross disproportionality principle – "the precise contours of which are unclear"[141] – is applicable to sentences for terms of years; that there was a "lack of clarity" in its precedents;[142] that it had "not established a clear or consistent path for courts to follow;"[143] and that the proportionality principles from Justice Kennedy's *Harmelin* concurrence "guide our application of the Eighth Amendment."[144] The Tenth Circuit, too, has instructed that "Justice Kennedy's opinion controls because it both retains proportionality and narrows *Solem.*"[145]

In light of these controlling holdings, the court must engage in a proportionality analysis guided by factors outlined in Justice Kennedy's *Harmelin* concurrence. In

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[139] *Id.* at 289, 100 S.Ct. 1133.

[140] 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

[141] *Lockyer v. Andrade,* 538 U.S. 63, 64, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

[142] *Id.* at 74 n. 1, 123 S.Ct. 1166 (2003).

[143] *Id.* at 72-73, 123 S.Ct. 1166.

[144] *Ewing v. California,* 538 U.S. 11, 23-24, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (O'Connor, J.).

[145] *See Hawkins v. Hargett,* 200 F.3d 1279, 1282 (10th Cir.1999), *cert. denied,* 531 U.S. 830, 121 S.Ct. 83, 148 L.Ed.2d 45 (2000).

particular, the court must examine (1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions.

Before turning to these *Harmelin* factors, it is important to emphasize that the criminal conduct at issue is solely that covered by the three § 924(c) counts. Mr. Angelos will be fully and appropriately punished for all other criminal conduct from the sentence on these other counts. Thus, the proportionality question in this case boils down to whether the 55-year sentence is November 16, 2004 disproportionate to the offense of carrying or possessing firearms three times in connection with dealing marijuana.

A. Mr. Angelos' Offenses and the Contemplated Penalty

The first *Harmelin* factor requires the court to compare the seriousness of the three § 924(c) offenses to the harshness of the contemplated penalty to determine if the penalty would be grossly disproportionate to such offenses. In weighing the gravity of the offenses, the court should consider the offenses of conviction and the defendant's criminal history,[146] as well as "the harm caused or threatened to the victim or society, and the culpability of the offender."[147] Simply put, "[d]isproportionality analysis measures the relationship between the nature and number

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[146] *See Ewing*, 538 U.S. at 29, 123 S.Ct. 1179 (O'Connor, J.).

[147] *Solem*, 463 U.S. at 292-294, 103 S.Ct. 3001.

of offenses committed and the severity of the punishment inflicted upon the offender."[148]

The criminal history in this case is easy to describe. Mr. Angelos has no prior adult criminal convictions and is treated as a first-time offender under the Sentencing Guidelines.

The sentence-triggering criminal conduct in this case is also modest. Here, on two occasions while selling small amounts of marijuana, Mr. Angelos possessed a handgun under his clothing, but he never brandished or used the handgun. The third relevant crime occurred when the police searched his home and found handguns in his residence. These handguns had multiple purposes – including recreational activities – but because Mr. Angelos also used the gun to protect himself while dealing drugs, the possession of these handguns is also covered by § 924(c).[149]

Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person. It is well-established that crimes marked by violence or threat of violence are more serious[150] and that the absence of direct violence affects the strength of society's interest in punishing a particular criminal.[151]

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[148] *Id.* at 288, 103 S.Ct. 3001.

[149] *See* PSR ¶ 73.

[150] *See Solem,* 463 U.S. at 292-293, 103 S.Ct. 3001.

[151] *See Rummel,* 445 U.S. at 275, 100 S.Ct. 1133.

It is relevant on this point that the Sentencing Commission has reviewed crimes like Mr. Angelos' and concluded that an appropriate penalty for all of Mr. Angelos' crimes is no more than about ten years (121 months).[152] With respect to the firearms conduct specifically, the Commission has concluded that about 24 months (a two-level enhancement) is the appropriate penalty.[153] The views of the Commission are entitled to special weight, because it is a congressionally-established expert agency which can draw on significant data and other resources in determining appropriate sentences. Comparing a recommended sentence of two years to the 55-year enhancement the court must impose strongly suggests not merely disproportionality, but gross disproportionality.

B. Comparison to Penalties for Other Offenses

The next *Harmelin* factor requires comparing Mr. Angelos' sentence with the sentences imposed on other criminals in the federal system.[154] Generally, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."[155] This factor points strongly in favor of finding that the sentence in this case is excessive. As shown in Tables I and II earlier in this opinion, Mr. Angelos will receive a far longer sentence than those imposed in the federal system for such major

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[152] *See* Part III.B.2, *supra*.

[153] *See id.*

[154] *Harmelin*, 501 U.S. at 1004-05, 111 S.Ct. 2680 (Kennedy, J., concurring).

[155] *Solem*, 463 U.S. at 291, 103 S.Ct. 3001.

crimes as aircraft hijacking, second-degree murder, racial beating inflicting life-threatening injuries, kidnapping, and rape. Indeed, Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes. Because Mr. Angelos is "treated in the same manner as, or more severely than, criminals who have committed far more serious crimes,"[156] it appears that the second factor is satisfied.

C. Comparison to Other Jurisdictions

The final *Harmelin* factor requires the court to examine "sentences imposed for the same crime in other jurisdictions."[157] Evaluating this factor is also straightforward. Mr. Angelos sentence is longer than he would receive in any of the fifty states. The government commendably concedes this point in its brief, pointing out that in Washington State Mr. Angelos would serve about nine years and in Utah would serve about five to seven years.[158] Accordingly, the court finds that the third factor is satisfied.

D. Application of the *Harmelin* Factors in Light of *Davis*

Having analyzed the three *Harmelin* factors, the court believes that they lead to the conclusion that Mr. Angelos'

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[156] *Id.* at 299, 103 S.Ct. 3001.

[157] *Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J., concurring).

[158] Government's Resp. Mem. Re: Constitutionality of Mandatory Minimum Sentences Pursuant to 18 U.S.C. § 924(c) at 23.

sentence violates the Eighth Amendment. But before the court declares the sentence unconstitutional, there is one last obstacle to overcome. The court is keenly aware of its obligation to follow precedent from superior courts – specifically the Tenth Circuit and, of course, the Supreme Court. The Supreme Court has considered one case that might be regarded as quite similar to this one. In *Hutto v. Davis*,[159] the Supreme Court held that two consecutive twenty-year sentences – totaling forty years – for possession of nine ounces of marijuana said to be worth $200 did not violate the Eighth Amendment. If *Davis* remains good law, it is hard see how the sentence in this case violates the Eighth Amendment. Here, Mr. Angelos was involved in at least two marijuana deals involving $700 and approximately sixteen ounces (one pound) of marijuana. Perhaps currency inflation could equate $700 today with $200 in the 1980's. But as a simple matter of arithmetic, if 40 years in prison for possessing nine ounces marijuana does not violate the Eighth Amendment, it is hard to see how 61 years for distributing sixteen ounces (or more) would do so.

The court is aware of an argument that the 1982 *Davis* decision has been implicitly overruled or narrowed by the 1983 *Solem* decision and other more recent pronouncements. For example, Justice Kennedy's concurring opinion in *Harmelin,* explained that "[o]ur most recent pronouncement on the subject in *Solem* appeared to apply a different analysis than in . . . *Davis.*"[160] But the Court apparently continues to view *Davis* as part of the fabric of

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[159] 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982).

[160] 501 U.S. at 997, 111 S.Ct. 2680 (Kennedy, J., concurring).

the law. Thus, Justice Kennedy's concurrence in *Harmelin,* after noting the seeming overruling of *Davis,* went on to discuss *Davis* along with other cases in distilling various "common principles" that control Eighth Amendment analysis.[161] Justice Kennedy also explained in Harmelin that his approach "takes full account of . . . *Davis,* [a] case[ ] ignored by the dissent."[162] More recently, in reviewing California's "three strikes" legislation last year, the plurality opinion reviewed *Davis* as one of a string of cases that guide analysis of Eighth Amendment challenges.[163]

In light of these continued references to *Davis,* the court believes it is it obligated to follow its holding here. Indeed, in *Davis* the Supreme Court pointedly reminded district court judges that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts. . . ."[164] Under *Davis,* Mr. Angelos' sentence is not cruel and unusual punishment. Therefore, his Eighth Amendment challenge must be rejected.

V. Calculating the Sentence

With Mr. Angelos' constitutional challenges to the 55-year sentence on § 924(c) counts resolved, the remaining issue before the court is the sentence to be imposed on the other counts. Mr. Angelos raises a constitutional challenge to the 78-97 month sentence called for by the Sentencing

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[161] *Id.* at 998, 111 S.Ct. 2680 (Kennedy, J., concurring); *see also id.* at 1004, 1005, 111 S.Ct. 2680 (Kennedy, J., concurring).

[162] *Id.* at 1005, 111 S.Ct. 2680 (Kennedy, J., concurring).

[163] *Ewing,* 538 U.S. at 21, 123 S.Ct. 1179 (O'Connor, J.).

[164] *Davis,* 454 U.S. at 375, 102 S.Ct. 703.

Guidelines for his thirteen other offenses. He notes that the Guidelines calculation rests on enhancements that were never submitted to the jury, in particular enhancements based on the quantity of drugs involved and the amount of money laundered. Under this court's decision in *United States v. Croxford*[165] interpreting *Blakely v. Washington,*[166] these enhancements extend the maximum penalty that can be imposed on Mr. Angelos beyond that supported by the jury's verdict. *Croxford* explains that the Sixth Amendment as interpreted in *Blakely* requires jury fact-finding on such issues as drug quantities and dollar values. The court therefore holds that the Guidelines are unconstitutional as applied to Mr. Angelos.

Without the Guidelines, the court is free to make its own determination of what is an appropriate sentence for these thirteen offenses. In making that determination, the court consults the Guidelines as instructive but not binding.[167] If the sentence on these thirteen counts was the only sentence that Mr. Angelos would serve, a sentence of about 78-97 months might well be appropriate. But the court cannot ignore the reality that Mr. Angelos will also be sentenced to 55 years on the § 924(c) counts, far in excess of what is just punishment for all of his crimes. In light of this 55-year sentence, and having considered all of the relevant factors listed in the Sentencing Reform Act,[168] the

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[165] 324 F.Supp.2d 1230 (D.Utah 2004); *see also United States v. Booker,* ___ U.S. ___, 125 S.Ct. 11, 159 L.Ed.2d 838 (2004) (granting certiorari to review this issue).

[166] ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

[167] *See Croxford,* 324 F.Supp.2d at 1248.

[168] 18 U.S.C. § 3553(a) (listing factors to be considering in imposing sentence).

court will impose a sentence of one day in prison for all offenses other than the § 924(c) counts. Lest anyone think that this is a "soft" sentence, in combination with the § 924(c) counts, the result is that Mr. Angelos will not walk outside of prison until after he reaches the age of 70.

Not content with a mere 55-year sentence in this case, the government argues that the court may not depart downward from the Guidelines simply because of the penalties imposed by the § 924(c) counts. Its argument rests on *United States v. Thornbrugh*,[169] in which the Tenth Circuit found it was an abuse of discretion for a district court to depart from the Guidelines because of the harsh effects of § 924(c). But for the reasons articulated in *Croxford,* the Guidelines no longer bind the court in this case. Therefore, the court need not "depart" from the Guidelines to impose a one day sentence, and thus the analysis of departures in *Thornbrugh* is not controlling in this case.

VI. Recommendations to Other Branches of Government

Having disposed of the legal arguments in this case, it seems appropriate to make some concluding, personal observations. I have been on the bench for nearly two-and-half years now. During that time, I have sentenced several hundred offenders under the Sentencing Guidelines and federal mandatory minimum statutes. By and large, the sentences I have been required to impose have been tough but fair. In a few cases, to be sure, I have felt that either the Guidelines or the mandatory minimums produced

[169] 7 F.3d 1471 (10th Cir.1993).

excessive punishment. But even in those cases, the sentences seemed to be within the realm of reason.

This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders – including violent offenders and even a murderer – who have been before me. For the reasons explained in my opinion, I am legally obligated to impose this sentence. But I feel ethically obligated to bring this injustice to the attention of those who are in a position to do something about it.

A. Recommendation for Executive Commutation

For all the reasons previously given, an additional 55-year sentence for Mr. Angelos under § 924(c) is unjust, disproportionate to his offense, demeaning to victims of actual criminal violence – but nonetheless constitutional. While I must impose the unjust sentence, our system of separated powers provides a means of redress. The Framers were well aware that "[t]he administration of justice . . . is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."[170] In my mind, this is one of those rare cases where the system has malfunctioned. "To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."[171] Under our Constitution, the President has

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[170] *Ex parte Grossman*, 267 U.S. 87, 120, 45 S.Ct. 332, 69 L.Ed. 527 (1925).

[171] *Id.* at 121, 45 S.Ct. 332.

"the Power to grant Reprieves and Pardons for Offenses against the United States. . . ."[172] One of the purposes of executive clemency is "to afford relief from undue harshness."[173] This power is absolute. "The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress."[174]

Given that the President has the exclusive power to commute sentences, the question arises as to whether I have any role to play in commutation decisions, *i.e.*, is it appropriate for me to make a commutation recommendation to the President. Having carefully reviewed the issue, I believe that such a recommendation is entirely proper. The President presumably wants the fullest array of information regarding cases in which a commutation might be appropriate. Moreover, the Executive Branch has indicated that it actively solicits the views of sentencing judges on pardon and commutation requests. The Office of the Pardon Attorney in the Department of Justice is responsible for handling requests for pardons and commutations. According to the U.S. Attorney's Manual Standards for Consideration of Clemency Petitions, the Pardon Attorney "routinely requests . . . the views and recommendations of the sentencing judge" on any request for commutation.[175]

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[172] U.S. CONST., art. I, § 2.

[173] *Id.*

[174] *Ex parte Grossman*, 267 U.S. at 120, 45 S.Ct. 332.

[175] U.S. Attorney's Manual § 1-2.111, available at www.usdoj.gov/pardon/petitions.htm.

I therefore believe that it is appropriate for me to communicate to the President, through the Office of the Pardon Attorney, my views regarding Mr. Angelos' sentence. I recommend that the President commute Mr. Angelos' sentence to a prison term of no more than 18 years, the average sentence recommended by the jury that heard this case.[176] The court agrees with the jury that this is an appropriate sentence in this matter in light of all of the other facts discussed in this opinion. The Clerk's Office is directed to forward a copy of this opinion with its commutation recommendation to the Office of Pardon Attorney.

B. Recommendation for Legislative Reform

While a Presidential commutation of Mr. Angelos' sentence would resolve his particular case, § 924(c) remains in place and will continue to create injustices in future cases. For the reasons explained in this opinion, the problem stems from the count stacking features of mandatory minimum sentences. In our system of separate powers, general correction of this problem lies in the hands of Congress which is possessed of the "legislative powers" granted in the Constitution.[177]

Again, the question arises regarding whether it is appropriate for me to communicate with Congress regarding apparent problems that have arisen in applying the mandatory minimums in this case. Having carefully studied the issue, I conclude that such a communication is proper. As Judge Calabresi on the Second Circuit has

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[176] *See* Part III. B.2, *supra.*

[177] U.S. CONST., art. I § 1.

noted, "[t]he tradition of courts engaging in dialogue with legislatures is too well-established in this and other courts to disregard."[178] Presumably Congress no less than the President desires feedback on how its statutes are operating. Congress also presumably wants to be informed in situations where its mandates are producing adverse effects, such as demeaning crime victims or risking a possible backlash from citizen juries.

Justice Anthony Kennedy recently commented on the roles of courts and legislatures in specific reference to mandatory minimums:

> The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just . . . A court decision does not excuse the political branches or the public from the responsibility for unjust laws.[179]

This court deals with sentencing matters on a daily basis and feels in a unique position to advise Congress on such matters. Congress itself has recognized the expertise

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[178] *United States v. Then*, 56 F.3d 464, 466 (2nd Cir.1995) (Calabresi J., concurring) (citing *Computer Associates Intern., Inc., v. Altai, Inc.*, 982 F.2d 693, 712 (2nd Cir.1992)) (exhorting Congress to resolve an issue); *Brock on Behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134, 1152-53 (D.C.Cir.1987) (Ginsburg, J., concurring) (stating that "Congressional attention to this matter may well be in order").

[179] Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, at 4 (Aug. 9, 2003) *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp-08-09-03.html (last visited November 16, 2004).

of the judiciary in matters of sentencing by placing the Sentencing Commission in the judicial branch of government. As the Supreme Court noted in *Mistretta v. United States,*[180] "sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment. . . . Congress placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise."[181]

For all these reasons, it is appropriate for me to communicate with Congress concerning the need for legislative reform. I express no view on mandatory minimum sentencing schemes in general. But for the reasons discussed in this opinion, one particular feature of the federal scheme – the "count stacking" feature of § 924(c) for first-time offenders – has lead to an unjust result in this case and will lead to unjust results in other cases. Particularly in cases (like this one) that do not involve direct violence, Congress should consider repealing this feature and making § 924(c) a true recidivist statute of the three-strikes-and-you're-out variety. In other words, Congress should consider applying the second and subsequent § 924(c) enhancements only to defendants who have been previously convicted of a serious offense, rather than to first-time offenders like Mr. Angelos. This is an approach to § 924(c) that the Tenth Circuit[182] and Justices Stevens, O'Connor, and Blackmun[183] believed Congress intended. It is an approach to sentencing that makes good

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[180] 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).

[181] *Id.* at 396, 109 S.Ct. 647.

[182] *United States v. Chalan,* 812 F.2d 1302, 1315 (10th Cir.1987).

[183] *Deal v. United States,* 508 U.S. at 137, 113 S.Ct. 1993 (Stevens, J., dissenting).

sense. The Clerk's Office is directed to forward a copy of this opinion to the Chair and Ranking Member of the House and Senate Judiciary Committees.

CONCLUSION

The 55-year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational. But our constitutional system of government requires the court to follow the law, not its own personal views about what the law ought to be. Perhaps the court has overlooked some legal point, and that the appellate courts will find Mr. Angelos' sentence invalid. But applying the law as the court understands it, the court sentences Mr. Angelos to serve a term of imprisonment of 55 years and one day. The court recommends that the President commute this unjust sentence and that the Congress modify the laws that produced it. The Clerk's Office is directed to forward a copy of this opinion with its commutation recommendation to the Office of Pardon Attorney and to the Chair and Ranking Member of the House and Senate Judiciary Committees.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. WELDON H. ANGELOS, Defendant-Appellant, --- GEORGE M. ANDERSON, et al., Amici Curiae.	No. 04-4282 (D.C. No. 2:02-CR-708-PGC)

ORDER

Filed April 4, 2006

Before **BRISCOE, ANDERSON** and **O'BRIEN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER,
Clerk

by: /s/ Jennifer Clark
Deputy Clerk

Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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18 U.S.C. § 924(c)

(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

Supreme Court, U.S.
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No. 06-26

In the Supreme Court of the United States

WELDON ANGELOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's sentence of 55 years of imprisonment, imposed for his conviction on three separate counts of possessing a firearm in furtherance of a drug trafficking crime under 18 U.S.C. 924(c), is grossly disproportionate to his offenses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 433 F.3d 738. The opinion of the district court (Pet. App. 30-102) is reported at 345 F. Supp. 2d 1227.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2006. A petition for rehearing was denied on April 4, 2006 (Pet. App. 103). The petition for a writ of certiorari was filed on July 3, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of Utah of five counts of possession of marijuana with intent to dis-

tribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 1, 3, 5, 9, and 13); three counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (Counts 2, 4, and 10); two counts of possessing a stolen firearm, in violation of 18 U.S.C. 922(j) (Counts 6 and 11); one count of possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k) (Count 7); two counts of unlawful possession of a firearm by a drug user, in violation of 18 U.S.C. 922(g)(3) (Counts 8 and 12); and three counts of money laundering, in violation of 18 U.S.C. 1956 (Counts 19 and 20) and 18 U.S.C. 1957 (Count 18). He was sentenced to a term of 660 months and one day of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-29.

1. For several years, petitioner, a 24-year-old, trafficked in large quantities of high-grade marijuana. He also distributed cocaine and other narcotics. During that time, petitioner affiliated himself with Varrio Loco Town (VLT), a violent street gang. Consistent with his gang affiliation and participation in the drug trade, petitioner repeatedly armed himself with firearms. Gov't C.A. Br. 4.

a. In April 2002, Ronnie Lazalde began working as a confidential informant for the Salt Lake City Metro Gang Unit, a joint state and federal drug task force. Jason Mazuran, a gang unit detective, learned from several of his informants that petitioner had distributed large quantities of drugs over an extended period of time. Because Lazalde was a member of the same gang as petitioner, Mazuran believed that Lazalde was well-positioned to purchase drugs from petitioner. Gov't C.A. Br. 4-5.

On May 10, 2002, Lazalde met with petitioner at Mazuran's directive. During the meeting, petitioner discussed his drug dealing operation and showed Lazalde a 10-millimeter Glock pistol that he carried in an ankle holster. Petitioner told Lazalde that he had a supplier in California who could provide large quantities of marijuana and cocaine. Thereafter, Lazalde arranged to purchase marijuana from petitioner. On May 21, June 4, and June 18, 2002, Lazalde made three controlled purchases of approximately one-half of a pound of marijuana from petitioner, amounts that Mazuran had dictated, even though petitioner normally sold much larger quantities. The controlled buys occurred in a store parking lot that was close to petitioner's residence on Fort Union Boulevard. Gov't C.A. Br. 5-6.

Petitioner displayed firearms during two of the transactions. At the May 21, 2002, transaction, Lazalde entered petitioner's black BMW and observed lodged between the seat and the center console the same 10-millimeter Glock pistol that petitioner had shown him at their May 10, 2002, meeting. Lazalde suspected that petitioner may have deliberately positioned the gun in that location to intimidate him (Lazalde) and prevent him from attempting to rob petitioner. At the June 4, 2002, transaction, petitioner was carrying the Glock pistol in an ankle holster. As Lazalde approached petitioner to complete the transaction, petitioner lifted his pant leg and displayed the gun to Lazalde. During subsequent debriefings, Lazalde told Mazuran that petitioner had carried a firearm to both buys and that, during the second buy, petitioner had brandished the gun. Gov't C.A. Br. 5-6.

b. On July 11, 2002, police officers arrested petitioner during an unrelated incident at an apartment

complex. At the time of his arrest, petitioner was carrying a stolen 10-millimeter Glock pistol, loaded with 13 hollow point rounds, in a holster on his ankle, and more than $4300 in cash in his pocket. Pétitioner later advised Lazalde of his arrest, and Lazalde immediately reported those facts to Mazuran. Gov't C.A. Br. 6.

c. On November 13, 2002, a federal grand jury in the District of Utah returned a five-count indictment against petitioner charging him with three counts of distributing marijuana, in violation of 21 U.S.C. 841(a)(1); carrying a firearm during and in relation to a drug trafficking crime, or possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c); and possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). Pet. App. 4.

d. Two days after his indictment, Mazuran served an arrest warrant on petitioner at his apartment. During a subsequent search, Mazuran recovered more than three pounds of marijuana in a bedroom closet and two bulletproof vests. Mazuran also found a briefcase with more than $22,000 in United States currency, as well as documentation of monies owed to petitioner by other drug dealers (pay/owe sheets), and a fully loaded Glock 17 pistol. Mazuran also seized a safe from the apartment, and a subsequent search of the safe uncovered two other loaded pistols, a large number of prescription pain pills for which petitioner had no prescription, opiate suckers, and more pay/owe sheets. One of the pistols, a Walther, that was found in the safe had been stolen from a third party. Agents also found a new Lexus sedan parked in the garage, which was later determined to have been purchased with more than $30,000 in drug proceeds. Gov't C.A. Br. 7; Pet. App. 4.

e. On December 16, 2002, federal agents assigned to the Task Force obtained a search warrant for petitioner's other residence on Fort Union Boulevard, which led to the discovery of the black BMW used in two of the controlled buys with Lazalde. The trunk of the vehicle contained a pound of marijuana and a Smith and Wesson revolver. A search of the residence itself led to the discovery of a safe in the master bedroom that contained $20,000 in cash and smelled of marijuana. Scales and drug packaging materials were found in the kitchen. Still further investigation of the premises led to the discovery of body armor, an assault rifle, 26 large duffel bags and several large suitcases (each of which was capable of holding at least 50 pounds of marijuana) containing marijuana residue, and more pay/owe sheets. Agents also seized photographs, taken years before the drug distribution charged in the indictment, depicting petitioner displaying firearms while holding large amounts of cash and illegal drugs. Gov't C.A. Br. 7-9.

f. On December 17, 2002, the day after the search of petitioner's Fort Union Boulevard residence, petitioner and his lawyer met with investigators. During that meeting, one of the purposes of which was to decide whether petitioner was willing to cooperate with authorities, petitioner admitted that he had been dealing marijuana and cocaine, and that he was able to obtain large quantities of any substance. No agreement was reached, however, because the agents suspected that petitioner had not been truthful about the source of his supply. Gov't C.A. Br. 11.

g. Following the seizure of the evidence from petitioner's residences, the government provided defense counsel with discovery materials pertaining to that evidence. The government advised counsel of its intent to

supersede the indictment to add additional offenses, but agreed to provide a plea offer before returning to the grand jury. On January 20, 2003, the government offered petitioner an opportunity to plead guilty to two counts of the initial indictment, with an agreed recommendation of 192 months of imprisonment. In addition, the government agreed not to seek a superseding indictment with additional charges. Petitioner rejected the offer. Gov't C.A. Br. 11-12.

h. On June 18, 2003, the grand jury returned a seventeen-count superseding indictment against petitioner adding additional counts of possessing marijuana with intent to distribute, and additional firearms charges, including multiple counts of carrying or possessing a firearm during and in relation to or in furtherance of a drug trafficking crime, possession of a stolen firearm, and possession of a firearm by a drug user. Pet. App. 4.

On October 1, 2003, following the completion of a financial crimes investigation by the Internal Revenue Service criminal investigation office, the grand jury returned a second superseding indictment adding three counts of money laundering. Gov't C.A. Br. 2-3. The second superseding indictment charged petitioner with a total of twenty criminal counts: six counts of distributing marijuana, in violation of 21 U.S.C. 841(a)(1) (Counts 1, 3, 5, 9, 13, and 15); five counts of carrying a firearm during and in relation to a drug trafficking crime or possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Counts 2, 4, 10, 14, and 16); two counts of possessing a stolen firearm in violation of 18 U.S.C. 922(j) (Counts 6 and 11); one count of possessing a firearm which had the importer's and manufacturer's serial number removed, obliterated and altered, in violation of 18 U.S.C. 922(k) (Count 7); three

counts of possessing a firearm while being an unlawful user of controlled substances in violation of 18 U.S.C. 922(g)(3) (Counts 8, 12, and 17); one count of engaging in and attempting to engage in a monetary transaction through or to a financial institution in criminally derived property in violation of 18 U.S.C. 1957 (Count 18); and two counts of conducting and attempting to conduct financial transactions which involved the proceeds of marijuana distribution in violation of 18 U.S.C. 1956(a)(1)(A)(i) (Counts 19 and 20). Pet. App. 4-5.

2. After a jury trial, petitioner was found guilty on 16 of the 20 counts, including three of the five Section 924(c) charges. Of the remaining four counts, one was dismissed by the court and the jury acquitted petitioner on the other three. Pet. App. 4-5.

3. The presentence report (PSR) noted (at ¶¶ 96-97) that the Section 924(c) convictions required the court to impose a 60-month sentence on the first conviction, see 18 U.S.C. 924(c)(1)(A)(i), and consecutive 300-month sentences on the second and third convictions, see 18 U.S.C. 924(c)(1)(C) and (i) ("In the case of a second or subsequent conviction under this subsection, the person shall" "be sentenced to a term of imprisonment of not less than 25 years."); see also *Deal* v. *United States*, 508 U.S. 129, 132-133 (1993) (interpreting the words "second or subsequent 'conviction'" in this provision to encompass multiple convictions obtained in a single proceeding).

4. Upon receipt of the PSR, the district court expressed concern about imposing what it described as "an extraordinarily long prison term," C.A. App. 106, and, for that reason, requested that the parties submit briefs addressing numerous sentencing-related issues, including whether the mandatory minimum sentences re-

quired by Section 924(c), as applied to petitioner, violated equal protection or amounted to cruel and unusual punishment. *Id.* at 106-114 (order delineating issues to be briefed).

5. In response to the court's order, petitioner argued that the Section 924(c) component of the proposed sentence violated his constitutional rights. On November 16, 2004, the district court entered a memorandum and opinion rejecting petitioner's constitutional challenges. Pet. App. 30-102. Although the court expressed the view that the sentence mandated by Section 924(c) in this case might "appear[] to be cruel, unjust, and irrational," *id.* at 33, it recognized that the sentence was "decreed" by the statute, *ibid.*; that "in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties," *ibid.*; and, therefore, that the court's "quite limited" role in evaluating petitioner's constitutional challenges permitted it to set aside the statute "only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment." *Ibid.* "After careful deliberation," the court concluded that a "fair[] appl[ication]" of controlling case law compelled rejection of petitioner's claims. *Ibid.*

With respect to petitioner's Eighth Amendment claim, the district court focused on whether petitioner's sentence was grossly disproportionate to the offenses at hand. After noting that the precise contours of the Court's "gross disproportionality" principle were "unclear," Pet. App. 88 (quoting *Lockyer* v. *Andrade*, 538 U.S. 63, 64 (2003)), the district court concluded that Justice Kennedy's concurring opinion in *Harmelin* v. *Michigan*, 501 U.S. 957 (1991), provides the governing test.

Pet. App. 88 (citing *Ewing* v. *California*, 538 U.S. 11, 23-24 (2003) (opinion of O'Connor, J.)). Under that test, the district court concluded, a "court must examine (1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions." *Id.* at 89.

The district court believed that each of the three *Harmelin* factors supported a conclusion that petitioner's sentence violated the Eighth Amendment. As to the first factor, the court characterized the sentence-triggering conduct as non-violent, consisting of two sales of small amounts of marijuana, while possessing a handgun under his clothing. Pet. App. 90. The court observed that, in the ordinary case, the act of possessing a firearm in relation to a crime triggers a two-level enhancement (a roughly 2-year penalty) under Section 2D1.1 of the Sentencing Guidelines, *id.* at 91, and concluded that the contrast between those sentences "strongly suggests * * * gross disproportionality." *Ibid.* As to the second factor, the court found that the fact that petitioner would receive a "far longer sentence" than persons who, in the court's view, had "committed far more serious crimes," *id.* at 92, supported a determination of gross disproportionality. As to the third factor, the court found in petitioner's favor that petitioner's federal gun sentence was "longer than he would receive in any of the fifty states." *Ibid.*

Although the court expressed the view that petitioner's sentence "violates the Eighth Amendment," Pet. App. 92-93, it ultimately rejected petitioner's claim on the basis of *Hutto* v. *Davis*, 454 U.S. 370 (1982) (per curiam), which rejected an Eighth Amendment challenge to a 40-year sentence imposed for possession of

nine ounces of marijuana worth about $200. Although cognizant "of an argument" that *Davis* had been "implicitly overruled or narrowed" by subsequent decisions, including *Solem* v. *Helm*, 463 U.S. 277 (1983), the court concluded that this Court has, in recent decisions, continued to view *Davis* as "part of the fabric of the law." Pet. App. 93-94. Recognizing its duty to follow precedent, *id.* at 94, the court concluded that *Davis* was materially indistinguishable from petitioner's case, and, on that basis, rejected petitioner's Eighth Amendment challenge. *Id.* at 93 ("[I]f 40 years in prison for possessing nine ounces [of] marijuana does not violate the Eighth Amendment, it is hard to see how 61 years for distributing sixteen ounces (or more) would do so.").[1]

6. The court of appeals affirmed. Pet. App. 1-29. Addressing petitioner's sentencing challenge, the court began by noting that the Eighth Amendment embodies a "narrow proportionality principle" applicable to noncapital sentences. *Id.* at 19. That principle "does not require strict proportionality between crime and sentence," *id.* at 20 (quoting *Ewing*, 538 U.S. at 23), but instead "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Ibid.* (quoting *Ewing*, 538 U.S. at 23, and *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)). The court also relied on the fact that this Court has only invalidated two sentences

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[1] While the court rejected petitioner's Eighth Amendment challenge, it recommended "that the President commute this unjust sentence and that the Congress modify the laws that produced it." Pet. App. 102. The court also directed the Clerk's Office "to forward a copy of this opinion with its commutation recommendation to the Office of [the] Pardon Attorney and to the Chair and Ranking Member of the House and Senate Judiciary Committees." *Ibid.*

under a proportionality standard,[2] while rejecting challenges to a number of other sentences,[3] as evidence that the principle is reserved "for only the extraordinary case." *Id.* at 21 (quoting *Lockyer*, 538 U.S. at 77).

"Applying these principles to the case at hand," Pet. App. 21, the court concluded that this was not an "'extraordinary' case" in which the sentence was grossly disproportionate to the crimes for which they were imposed. *Ibid.* The court emphasized that Congress specifically intended "the lengthy sentences mandated by § 924(c)" "(a) [to] protect society by incapacitating those criminals who demonstrate a willingness to repeatedly engage in serious felonies while in possession of firearms, and (b) to deter criminals from possessing firearms during the course of certain felonies." *Id.* at 22; see *Muscarello* v. *United States*, 524 U.S. 125, 132

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[2] See Pet. App. 20 (citing *Weems* v. *United States*, 217 U.S. 349, 367 (1910) (invalidating on Eighth Amendment grounds a sentence of 15 years in chains and at hard labor, plus permanent civil disabilities, for the crime of falsifying a public document), and *Solem* v. *Helm*, 463 U.S. 277 (1983) (invalidating on Eighth Amendment grounds a sentence of life without parole imposed under a state law against a nonviolent recidivist whose final crime was writing a bad check with the intent to defraud)).

[3] In addition to *Davis*, the court of appeals cited *Rummel* v. *Estelle*, 445 U.S. 263 (1980) (life sentence with the possibility of parole under a state recidivist statute for three successive convictions for fraudulent use of a credit card to obtain $80 worth of goods, passing a forged check for $28.36, and obtaining $120.75 by false pretenses); *Harmelin*, 501 U.S. at 1001-1005 (opinion of Kennedy, J.) (life sentence without the possibility of parole for possession of more than 650 grams of cocaine); *Ewing*, 538 U.S. at 30-31 (sentence of 25 years to life under a state recidivist statute for the offense of felony grand theft); and *Lockyer*, 538 U.S. at 77 (two consecutive 25 year sentences under a state recidivist statute for two counts of petty theft). Pet. App. 20-21.

(1998) (Section 924(c)'s "basic purpose" was "to combat the 'dangerous combination' of 'drugs and guns'") (quoting *Smith* v. *United States*, 508 U.S. 223, 240 (1993)). The court also emphasized that all three of the firearms at issue "appear to have facilitated [petitioner's] drug trafficking by, if nothing else, providing protection from purchasers and others," Pet. App. 22-23, and by facilitating his "possession and distribution of illegal drugs." *Id.* at 23 (citing *Harmelin*, 501 U.S. at 1002 ("Possession, use, and distribution of illegal drugs represents one of the greatest problems affecting the health and welfare of our population.") (citation and internal quotation marks omitted)). In light of these strong societal interests and the validity of the penological theories underlying the punishments, the court concluded that "the sentences imposed on [petitioner] are not grossly disproportionate to his crimes." *Id.* at 24; see *id.* at 26-27.

The court of appeals acknowledged that the district court had rejected petitioner's Eighth Amendment argument by relying on *Hutto* v. *Davis*, *supra*, and that petitioner contended that *Davis* is no longer good law. Pet. App. 25. That contention overlooked, the court concluded, that this Court has continued to cite *Davis*, "thereby clearly indicating that the holding in *Davis*" —that a 40-year sentence for marijuana trafficking is not cruel and unusual punishment—"remains 'good law.'" *Ibid.* More importantly, the court of appeals went on to make clear that under *Harmelin*, the threshold question is whether a sentence is "grossly disproportionate to the crime for which it was imposed," *id.* at 25-26, and on that issue, the court of appeals rejected the district court's assessment. "In our view," the court explained, "the district court failed to accord proper deference to Congress's decision to severely punish criminals

who repeatedly possess firearms in connection with drug-trafficking crimes." *Id.* at 26. The court continued as follows:

> [a]lthough it is true that [petitioner] had no significant adult criminal history, that appears to have been the result of good fortune rather than petitioner's lack of involvement in criminal activity. The evidence presented by the government at trial clearly established that [petitioner] was a known gang member who had long used and sold illicit drugs. Further, the government's evidence established that, at the time of his arrest, [petitioner] was a mid-to-high [level] drug dealer who purchased and in turn sold large quantities of marijuana. In addition, the government's evidence established that [petitioner] possessed and used a number of firearms, some stolen, to facilitate his drug-dealing activities. Lastly, the evidence established that although [petitioner] had some involvement in the music industry, he failed to financially profit from that involvement and indeed never reported any positive earnings to the Internal Revenue Service. Thus, the only reasonable inference that could be drawn was that [petitioner's] sole source of income was his drug-trafficking operations.

Id. at 26-27. Because the court of appeals held that the threshold factor of "gross disproportionality" was not satisfied, it did not "'proceed to the comparative analyses' of the second and third factors" of *Harmelin*'s test. *Id.* at 26.[4]

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[4] The court of appeals also rejected petitioner's equal-protection-based challenged to his sentence. Pet. App. 27-28. Petitioner does not renew that challenge in this Court.

ARGUMENT

Petitioner contends (Pet. 4-29) that the 660-month consecutive sentence mandated by 18 U.S.C. 924(c) for his three firearms convictions constitutes cruel and unusual punishment, in violation of the Eighth Amendment. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. In *Harmelin* v. *Michigan*, 501 U.S. 957 (1991), this Court held that a mandatory sentence of life imprisonment for the crime of possessing 650 grams of cocaine does not violate the Eighth Amendment's prohibition against "cruel and unusual" punishment. Two Justices concluded that the Eighth Amendment prohibits only certain forms of punishment, and that it does not require proportionality between a non-capital sentence and the crime for which it is imposed, *id.* at 976 (opinion of Scalia, J., joined by Rehnquist, C.J.). Three Justices concluded that "the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle" under which a "comparative analysis within and between jurisdictions" is appropriate, but that such an analysis is required "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," *id.* at 997, 1004-1005 (opinion of Kennedy, J., joined by O'Connor & Souter, JJ.). The court of appeals correctly held that petitioner's sentence is not "grossly disproportionate to the crime." Pet. App. 26.

In addition to other crimes, petitioner was convicted on three counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of Section 924(c)

(Counts 2, 4, and 10). That statute mandates a consecutive minimum sentence of 60 months of imprisonment for using, carrying, or possessing a firearm in connection with a drug-related offense. See 18 U.S.C. 924(c)(1)(A)(i). "In the case of a second or subsequent conviction under this subsection," the statute mandates a consecutive minimum sentence of 300 months of imprisonment. See 18 U.S.C. 924(c)(1)(C)(i). In *Deal* v. *United States*, 508 U.S. 129 (1993), this Court held, as a matter of statutory construction, that the "second or subsequent conviction" provision of Section 924(c) is not limited to distinct judgments of conviction entered in separate criminal proceedings, but is triggered as well when multiple convictions for violating Section 924(c) are obtained in a single proceeding. *Id.* at 132-133. Thus, petitioner was subject to a mandatory sentence of 660 months of imprisonment (60 plus 300 plus 300) for his three Section 924(c) convictions, which are required to be served consecutively to whatever sentence was imposed for petitioner's 13 other serious crimes. See 18 U.S.C. 924(c)(1)(A)(i) and (C)(i).

The court of appeals correctly held that petitioner's sentence of 660 months is not suspect under the Eighth Amendment as "grossly disproportionate" to his crimes. That holding is entirely consistent with the numerous cases in which this Court has considered and rejected similar claims of disproportionality, including: *Harmelin*, in which the Court upheld a life sentence for possession of 650 grams of cocaine by a first-time offender, 501 U.S. at 1001-1005 (opinion of Kennedy, J.); *Rummel* v. *Estelle*, 445 U.S. 263, 285 (1980), which upheld a life sentence with the possibility of parole under a state recidivist statute for three successive convictions for fraudulent use of a credit card to obtain $80 worth of

goods, passing a forged check for $28.36, and obtaining $120.75 by false pretenses; *Ewing* v. *California*, 538 U.S. 11, 28-30 (2003) (opinion of O'Connor, J.), which upheld a sentence of twenty-five years to life under a state recidivist statute for the offense of felony grand theft; *Hutto* v. *Davis*, 454 U.S. 370 (1982) (per curiam), which upheld a 40-year sentence for the crime of distributing nine ounces of marijuana; and *Lockyer* v. *Andrade*, 538 U.S. 63, 77 (2003), which upheld as reasonable a state court's conclusion that two consecutive sentences of twenty-five years to life under a state recidivist statute for two counts of petty theft was not grossly disproportionate. See Pet. App. 20-21 (noting those decisions).

The decision of the court of appeals is also consistent with those of other circuits, which have likewise rejected Eighth Amendment challenges to lengthy prison sentences imposed pursuant to Section 924(c). See, *e.g.*, *United States* v. *Hungerford*, No. 05-30500, 2006 WL 2923703, at *2 (9th Cir. Oct. 13, 2006) (rejecting challenge to a sentence of 1917 months for seven Section 924(c) convictions and related bank robbery convictions); *United States* v. *Beverly*, 369 F.3d 516, 523, 537 (6th Cir. 2004) (upholding a sentence of 71 and a half years for a first-time offender, 65 years of which resulted from four Section 924(c) convictions for driving a getaway car in four bank robberies); *United States* v. *Arrington*, 159 F.3d 1069, 1073 (7th Cir. 1998) (rejecting an Eighth Amendment challenge to a 65-year sentence imposed for four Section 924(c) violations), cert. denied, 526 U.S. 1094 (1999); *United States* v. *Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998) (mandatory consecutive sentences for violations of Section 924(c) amounting to 1141 and 597 months for two co-defendants did not violate the Eighth Amendment).

b. Petitioner makes no explicit attempt to distinguish his sentence as being somehow more disproportionate than the sentences upheld in the cases noted above, with the exception of *Davis*, which petitioner distinguishes on the ground that the defendant in that case "was a recidivist," whereas petitioner "is a first-time offender." Pet. 24 n.11. See also Pet. 6, 27, 29. The contention that petitioner's sentence is unconstitutional because his criminal convictions came in a single proceeding, rather than seriatim, fails to recognize that multiple violations inflict multiple harms and that Congress determined to deal harshly with multiple offenses under Section 924(c) because of the heightened societal dangers posed by firearms in the context of drug trafficking. In *Deal* v. *United States*, *supra*, the Court rejected an argument that the provision in Section 924(c)(1)(C)(i) for consecutive 300-month sentences for each "second or subsequent conviction" should be construed to apply only when the defendant had already been convicted of a Section 924(c) violation in a separate criminal proceeding. The Court reasoned that severe punishment for multiple violations rationally served the purposes of "taking repeat offenders off the streets for especially long periods" and "visiting society's retribution upon repeat offenders more severely." 508 U.S. at 136. The Court found nothing in those "goals [to] defy 'common sense.'" *Ibid.* And it rejected Deal's reliance on the rule of lenity, which depended on Deal's view that his 105-year sentence could not have been intended by Congress because it was "glaringly unjust." *Id.* at 137.

Petitioner's attempt to minimize the seriousness of his use of a gun in connection with drug deals is also directly contrary to Justice Kennedy's rejection—as "false to the point of absurdity"—of the defendant's con-

tention in *Harmelin* that the possession of 650 grams of cocaine was "nonviolent and victimless." 501 U.S. at 1002. Justice Kennedy stressed the larger connection between drugs and violence in society, which justifies a legislature's rational assessment of the need for serious punishment. *Id.* at 1002-1003. See *Smith* v. *United States*, 508 U.S. 223, 239 (1993) ("Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society."). In light of this Court's holding that Harmelin's life sentence for a first-time drug conviction for mere possession with no charge of threatening violence or using firearms, see 501 U.S. at 1021 (White, J., dissenting), is consistent with the Eighth Amendment, the sentence imposed on petitioner, who habitually possessed, carried, and brandished firearms in the course of distributing illegal drugs, is not grossly disproportionate to his offenses. Thus, the court of appeals correctly concluded that petitioner's case was not one of those "rare cases" where the sentence gives rise to an inference of gross disproportionality, and that it was therefore not necessary to conduct a comparative analysis of intra- and interjurisdictional sentences. See *id.* at 997, 1004-1005 (opinion of Kennedy, J.) (comparative analysis is "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality").

To the extent the Eighth Amendment analysis focuses on a defendant's entire course of criminal conduct and his overall sentence, petitioner's claim of gross disproportionality has even less force. In addition to his Section 924(c) violations, petitioner was convicted on 13

other counts. The maximum statutory penalty that could have been imposed on petitioner for those other counts was 125 years, or 1500 months.[5] He received one day of imprisonment on those counts. Moreover, petitioner's Section 924(c) convictions should not be viewed, as petitioner does, in isolation from the larger criminal conduct of which they were part. Whereas petitioner would have the Court view this as a case of "three acts of possessing (not using or even displaying) * * * guns," in connection with "two $350 marijuana deals," Pet. 28 (quoting Pet. App. 32), the court of appeals was correct to put petitioner's sentence in the context of the full scope of the criminal activity out of which his convictions arose. See Pet. App. 26-27. See *Ewing*, 538 U.S. at 28-30 (opinion of O'Connor, J.) (discussing full scope of defendant's criminal activity, rather than the single act that gave rise to the defendant's conviction and sentence). That conduct reveals a protracted course of dealing in large quantities of marijuana, accompanied by the possession of an arsenal of weapons. Petitioner's "good fortune," Pet. App. 26, in escaping prior punishment does not mitigate the seriousness of his criminal conduct.

2. The principal focus of the petition is its argument that summary dispositions by this Court are problematic

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[5] See PSR ¶ 95 (five years per count on Counts 1, 3, 5, 9 and 13 for possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1)); PSR ¶ 98 (10 years per count on Counts 6 and 11 (possessing a stolen firearm, in violation of 18 U.S.C. 922(j)), Counts 8 and 12 (unlawful possession of a firearm by a drug user, in violation of 18 U.S.C. 922(g)(3)) and Count 7 (possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k)); PSR ¶ 99 (10 years on Count 18 (money laundering, in violation of 18 U.S.C. 1957); and PSR ¶ 100 (20 years on Counts 19 and 20 for money laundering, in violation of 18 U.S.C. 1956).

because they are "procedurally unfair to the parties and fraught with peril for practitioners and the lower judiciary," Pet. 8, because they are often "mistaken, imprudent, or muddled," Pet. 13, and because "the jurisprudence on summary dispositions [i]s a mess," Pet. 20. With more specific relevance to this case, petitioner asserts (Pet. 24-27) that *Hutto* v. *Davis* can no longer be considered "good law," Pet. 24-27, principally because it was issued as a per curiam decision summarily reversing the court of appeals, Pet. 20-24. Petitioner argues that this case is "a particularly appropriate vehicle to examine the precedential value of summary dispositions" like *Davis*. Pet. 20.

This Court "reviews judgments," not abstract questions of law with no relevance to the case at bar. *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Even assuming that it would be desirable for the Court, in an appropriate case, to address the lower courts' alleged "uncertain[ty] as to the precedential value of summary dispositions on the merits," Pet. 4-5, this case presents no occasion to do so.

Petitioner's contention that this is an appropriate case "to resolve the uncertainty over the precedential value of the *per curiam* opinion in *Hutto* v. *Davis*," Pet. 4, is based upon the way in which the *district court* relied on *Davis*. See Pet. 6-8 (discussing only the district court's reasoning and conclusion that *Davis* controlled its disposition of petitioner's claim). In contrast, the court of appeals' opinion, which this Court is asked to review, does not turn on *Davis* in particular, but on this Court's Eighth Amendment cases more generally. The court of appeals recognized the continuing validity of *Davis*, but based its rejection of petitioner's claim on its conclusion that petitioner failed to satisfy "the first, and

controlling, 'factor' in *Harmelin*, i.e., whether the sentence at issue is grossly disproportionate to the crime." Pet. App. 26. In making that determination, the court of appeals emphasized Congress's prerogative to determine the appropriate punishment for a crime and noted this Court's own pronouncements reinforcing the well-recognized link between drugs and guns. *Ibid.* On that basis, the court of appeals concluded that petitioner's sentence could not be said to be grossly disproportionate to the crimes of possessing, carrying, or brandishing firearms in connection with his drug-dealing activities on three separate occasions. *Ibid.* In its analysis of the legal standard, the court of appeals did summarize *Davis* as one of the five cases in which this Court had rejected a claim of gross disproportionality, *id.* at 20-21, but the court of appeals relied far more heavily on the facts and analysis in *Harmelin* for its conclusion that the sentence for petitioner's use of firearms to "facilitate his drug-dealing activities" was not disproportionate. *Id.* at 26; see *id.* at 23. See also *Hungerford*, 2006 WL 2923703, at *9 n.4 (Reinhardt, J., concurring) (explaining that the court was "foreclosed from holding" defendant's 1917-month sentence for seven Section 924(c) violations "to be in violation of the cruel and unusual punishment clause * * * by *Harmelin* and *Ewing*").

Thus, an opinion along the lines petitioner requests —holding that summary dispositions such as *Davis* are no longer precedential—would not affect the court of appeals' judgment in his case. As a result, this case is a particularly unsuitable vehicle for considering *Davis*'s precedential status (let alone the precedential value of all summary dispositions).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-26

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In The
Supreme Court of the United States

WELDON ANGELOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether this Court's summary disposition in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*), stands as a precedential bar to a lower court otherwise concluding that a sentence violates the Eighth Amendment's ban on cruel and unusual punishment under the *Solem-Harmelin* analysis articulated after *Davis* and in opinions of the Court rendered after plenary review, full briefing, and oral argument.

2. Whether it violates the Eighth Amendment to impose a mandatory 55-year sentence on a first-time offender for possessing firearms in connection with selling small amounts of marijuana, where no violence or injury was caused or threatened, where far more serious federal offenses would receive lesser punishment, and where no other jurisdiction would impose such a severe sentence.

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REPLY BRIEF FOR PETITIONER

The Government's response, requested by this Court, recommends that the Supreme Court deny review of the petition. But the arguments the Government makes in support of its position, and perhaps more telling, the issues it avoids or attempts to diffuse, highlight the need for this Court's review.

First, the Government spends the majority of its brief relaying its version of the facts in this case, largely as presented in its brief before the Tenth Circuit Court of Appeals. It does not once rely on the facts as found by the District Court, which were never found to be clearly erroneous by the appellate panel, and which, not surprisingly, tell a far different story. This is an obvious effort by the Government to distract the Court from the real issues presented by this case.

Second, the Government confuses what is required for this Court's review and, in particular, what is required for the Court to reach the key question presented by this case, the precedential effect of *per curiam* opinions such as *Hutto v. Davis*, 454 U.S. 370 (1982). The Government does not deny that, in reaching the conclusion that there was no Eighth Amendment violation here, both the District Court and the appellate panel relied on *Davis*. *See* Br. in Opp. 20-21. In fact, as further described below, when the Eighth Amendment analysis is done as the Court's precedents dictate, this case turns on the continuing effect of *Davis*. But rather than deny that there is significant uncertainty with respect to the precedential value of *per curiam* opinions like *Davis* or make any argument that this question is otherwise unworthy of the Court's attention, the Government asserts that *Davis* just isn't that important to this particular case. Such an approach is off the mark and does nothing to counter Petitioner's arguments that this case presents significant issues that are in need of the Court's review. Petitioner therefore respectfully requests that the writ of certiorari be granted.

I. The Facts Are Those As Found By The District Court.

Instead of responding to the questions raised in the petition on their merits, the majority of the Government's response is dedicated to rehashing factual disputes that were resolved in the District Court. Rather than explain its dissatisfaction with the District Court's resolution of those issues, the Government repeatedly cites *its own brief* before the Court of Appeals as a source of facts. *See* Br. in Opp. 2-6 (citing Gov't C.A. Br.). The Government never once acknowledges that it is repeating its own version of the facts which were not found by the District Court. The Court should reject outright this questionable tactic as inappropriate and misguided.[1]

In addition, the Government's response also recites supposed factual findings of the appellate panel. While the legal question of whether a sentence violated the Eighth

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[1] Were this an appropriate approach to presenting the facts before the Supreme Court, Petitioner could cite his own brief as a means to impeach the factual basis for nearly all of his sentence. For instance, the testimony of confidential informant Ronnie Lazalde – that Petitioner possessed a firearm during two controlled buys – was directly contradicted by the testimony of other government witnesses, police reports, and surveillance photos. This was exceedingly important because Lazalde was the only person to claim that Petitioner possessed a firearm on these two occasions, which, in turn, served as the basis for 50 years of Petitioner's 55-year sentence. (Ironically, the Government's brief in the Court of Appeals acknowledges that "[a]n informant, like Lazalde, does not have ... a professional duty" to provide accurate information. Gov't C.A. Br. 104-05.) The initial police reports on the debriefing of Lazalde contained no reference to Petitioner's possessing a firearm during the incidents; instead, a single entry alleging firearms possession was added to the police reports several months later. In addition, Lazalde had a long criminal record (unlike Petitioner), and at the time of the controlled buys, Lazalde had drug sales and related gun possession charges pending against him (i.e., virtually identical charges as those filed against Petitioner). In the end, however, Lazalde's charges were not just reduced via plea bargain, but instead totally disappeared from the criminal justice system altogether. *See, e.g.*, Def. C.A. Br. 82-86; Def. C.A. Reply 25-28; Def. C.A. Reh'g Pet. 6-7. Unlike the Government, however, Petitioner accepts the factual findings of the District Court, focusing this Court's attention on critical legal issues in the petition for writ of certiorari.

Amendment is subject to *de novo* review on appeal, a trial court's findings of fact are entitled to due deference and should be set aside only when clearly erroneous.[2] In the present case, the District Court made factual findings that served as the basis for its determination that the underlying sentence was grossly disproportionate. Among other things, the District Court found that: Mr. Angelos was a 24-year-old first offender and not a recidivist; on three occasions, Mr. Angelos sold small amounts of marijuana for several hundred dollars; and he was a successful music executive. Pet. App. 32-37, 69-74, 89-92.

The appellate panel never held that the District Court's factual findings were clearly erroneous, nor did it determine that the factual findings required a different legal outcome. Instead, the panel appears to have revised the trial court's findings in significant ways, *sub silentio*, without concluding first that the District Court had erred.[3] In particular, the panel concluded that: Mr. Angelos's status as a first-time offender "appears to have been the result of good fortune rather than Angelos's lack of involvement in criminal activity"; "Angelos was a known gang member who had long used and sold illicit drugs," and he "was a mid-to-high drug dealer who purchased and in turn sold large quantities of marijuana"; and he was not successful in the music

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[2] *See, e.g., United States v. Serrata*, 425 F.3d 886, 906 (10th Cir. 2005) (holding that district court's factual findings in sentencing are reviewed only for clear error). *See also United States v. Marshall*, 411 F.3d 891, 895 (8th Cir. 2005) ("It is well established that in sentencing matters a district court's assessment of witness credibility is quintessentially a judgment call and virtually unassailable on appeal."); *United States v. Magallanez*, 408 F.3d 672, 682 (10th Cir. 2005) ("It is not the role of an appellate court to consider the credibility of the witnesses or weigh the conflicting evidence, as these matters are within the exclusive province of the jury.").

[3] At one point, the panel asserted that it "carefully review[ed] the record on appeal, including the trial transcript." Pet. App. 15. While it may have examined the incomplete record before it, the panel simply could not have reviewed the trial transcript as claimed: The trial was conducted over the course of seven days, and only extracts of the transcript were part of the record on appeal.

industry and profited only from drug dealing. Pet. App. 26-27.

The appellate panel's actions were clearly inconsistent with this Court's precedents holding that reviewing courts have "no business disturbing the District Court's [factual findings] 'simply because we would have decided the case differently.'" *Georgia v. Ashcroft*, 539 U.S. 461, 498 (2003) (*quoting Easley v. Cromartie*, 532 U.S. 234, 242 (2001)). Given "the District Court's superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom," *United States v. Arvizu*, 534 U.S. 266, 276 (2002), appellate courts must "refrain from reviewing findings of fact which have evidence to support them." *United States v. Johnson*, 327 U.S. 106, 113 (1946).[4] And when it comes to issues of fact for sentencing, this Court has held that "[d]istrict courts have an institutional advantage over appellate courts." *Koon v. United States*, 518 U.S. 81, 98 (1996). In the present case, the appellate panel did not find the District Court's factual findings to be "wholly unsupported by the evidence" and instead simply substituted its own facts, despite this Court's admonition that "it should never do so where it does not clearly appear that the findings are not supported by any evidence." *Johnson*, 327 U.S. at 111-12.

In addition to conflicting with this Court's precedent on the proper role of a reviewing court, the appellate panel's actions raise difficult constitutional questions.[5] They also

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[4] *See, e.g., Mickens v. Taylor*, 535 U.S. 162, 177 (2002) (Kennedy, J., concurring) ("Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous."). *See also Buford v. United States*, 532 U.S. 59, 64-66 (2001) (adopting deferential standard of review for district court sentencing decisions); *Koon*, 518 U.S. at 96-100 (1996) (similar).

[5] Specifically, the panel may have infringed upon Petitioner's Fifth and Sixth Amendment rights. While it is true that a trial judge generally has discretion "in determining what sentence to impose" as well as "the kind of information he may consider, or the source from which it may come," *United States v. Tucker*, 404 U.S. 443, 446 (1972), *see also United States v. Booker*, 543 U.S. 220, 264-65 (2005) (discussing district court

(Continued on following page)

create serious confusion regarding the proper application of this Court's Eighth Amendment jurisprudence. Since the Court first articulated its three-part analysis more than twenty years ago, it has never used unproven facts in applying this test. *See Ewing v. California*, 538 U.S. 11, 28-31 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 1001-05 (1991) (Kennedy, J., concurring); *Solem v. Helm*, 463 U.S. 277, 295-303 (1983). Yet the appellate panel analyzed the first factor of the *Solem-Harmelin* test – whether the sentence is grossly disproportionate to the underlying offenses – based not on current or prior crimes of conviction but on mere speculation and unproven allegations.[6] Among other things, the appellate panel has essentially invented a new category of offender, which the Government apparently approves: the first-time offender as "the result of good fortune," who thus can be viewed as a recidivist. *See* Pet. App. 26; Br. in Opp. 13, 19.

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discretion in sentencing); a defendant's sentence cannot be based upon "misinformation of constitutional magnitude," such as "'assumptions concerning his criminal record which were materially untrue.'" *Tucker*, 404 U.S. at 447 (*quoting Townsend v. Burke*, 334 U.S. 736, [illegible] (1948)). Likewise, a defendant's right to counsel "'necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem.'" *Herring v. New York*, 422 U.S. 853, 860 (1975) (*quoting Yopps v. State*, 228 Md. 204, 207 (1962)). The Sixth Amendment thus "constitutionalizes the right in an adversary criminal trial to make a defense as we know it," *Faretta v. California*, 422 U.S. 806, 819 (1975); and "the opportunity to participate fully and fairly in the adversary factfinding process." *Herring*, 422 U.S. at 858. There could even be a latent Sixth Amendment jury-trial right problem created by the panel's inappropriate fact-finding. *See, e.g.*, *Booker*, 543 U.S. 220, and cases cited therein.

[6] The unprecedented nature of the panel's methodology has not gone unnoticed by legal commentators. For instance, it was chided by one of the nation's leading scholars of federal sentencing: "In the Tenth Circuit, apparently a defendant's reputation, and not simply the crimes of conviction, are central to an analysis of the Eighth Amendment's prohibition on cruel and unusual punishments." Prof. Douglas Berman, "Tenth Circuit affirms 55-year mandatory minimum sentence in *Angelos*," Sentencing Law and Policy, Jan. 10, 2006, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/angelos_55year_.html.

One might anticipate, however, a substantially different response to the natural corollary category: the recidivist as "the result of *bad* fortune," who therefore should be treated as a first-time offender. But, of course, neither category actually exists. The appellate panel's unfounded approach cannot be squared with this Court's Eighth Amendment jurisprudence and its examination of the constitutionality of a sentence based solely on the current or prior convictions.

Accordingly, the Court should reject the self-styled facts in the Government's response and the inappropriate factual findings in the appellate panel's opinion. The facts found by the District Court are controlling and are the factual findings currently before the Court. This is the approach taken not just by Petitioner but also Amici Curiae, composed of more than twelve dozen former federal judges, federal prosecutors, and high-ranking Department of Justice officials. *See* Br. Amici Curiae 4. The correct legal analysis was that employed by the District Court: the three-part test of *Solem v. Helm*, 463 U.S. 277 (1983), and *Harmelin v. Michigan*, 501 U.S. 957 (1991). After careful analysis, each of the *Solem-Harmelin* factors "lead to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment." Pet. App. 92-93. Only this Court's decision in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*), prevented a ruling that Petitioner's sentence violates the Eighth Amendment. Pet. App. 93-94. The issue, then, is whether *per curiam* decisions like *Davis* have such preclusive effects.

II. The Precedential Value Of *Hutto v. Davis* And *Per Curiam* Opinions Generally Is The Key Issue In This Case.

When viewed through the proper analysis, *Hutto v. Davis* is at the very center of this case. As detailed in the petition, the lower courts were incorrect to believe that *Davis* foreclosed Petitioner's Eighth Amendment challenge. *Davis* is of uncertain precedential value given its status as a summary disposition by *per curiam* opinion; it is also clearly distinguishable from the present case and has been effectively overruled by subsequent decisions. Pet. 4-24; *see also* Br. Amici Curiae 1-11. The District Court recognized that

Davis was of questionable precedential value but cannot be disregarded until the Supreme Court decides as much. Pet. App. 93-94. This case offers the Court just such an opportunity to provide clarity to the lower courts.

As detailed in the petition, the Court has vacillated over the years in its treatment of summary dispositions by *per curiam* opinion. Sometimes these opinions are regarded as fully binding and controlling precedents, but at other times they are deemed to be of lesser precedential value; and because such summary dispositions do not themselves seek to explain the *raison d'être* of this type of opinion, little guidance has been provided as to their value and proper application. *See* Pet. 8-16. Members of this Court have recognized that summary dispositions by *per curiam* opinion carry "a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts." *Harris v. Rivera*, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting); *see also Lehman v. Trout*, 465 U.S. 1056, 1062 (1984) (Stevens, J., dissenting). The petition described how this concern has, in fact, come to fruition in various cases, with the lower courts reaching different conclusions in their interpretation and application of summary dispositions, sometimes rectified only through plenary consideration of this Court. *See* Pet. 17-20.[7]

While some lower court decisions have concluded that *per curiam* opinions are to be narrowly interpreted and are of limited precedential value, *see, e.g., In re Kandu*, 315 B.R. 123, 138 (W.D. Wash. 2004); the lower courts in this case accorded the summary disposition in *Hutto v. Davis* the same value and interpretive breadth as Supreme Court decisions rendered after plenary review, full briefing, and oral argument. As detailed in the petition, confusion over the value and application of summary dispositions in general, as well as the lack of detailed analysis in *Davis* and the failure of the lower courts to recognize its underlying purpose (i.e.,

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[7] In addition to those referred to in the petition, many other lower court decisions have expressed confusion over the meaning of the Supreme Court's *per curiam* opinions. *See, e.g., Campbell v. Wood*, 20 F.3d 1050 (9th Cir. 1994) (*en banc* opinions expressing disagreement over meaning of *In re Blodgett*, 502 U.S. 236 (1992) (*per curiam*)).

enforcing a previous remand), muddled an otherwise clear result under the Court's Eighth Amendment standard. *See* Pet. 20-24. The current case thus provides an excellent vehicle to offer guidance on the application and precedential value of summary dispositions on the merits.

III. The Government's Efforts To Avoid *Davis* Fall Flat.

In its attempt to avoid the central question presented by this case, the Government contends that Petitioner has failed to distinguish this case from previous Supreme Court and lower court decisions. Br. in Opp. 15-16. Such an assertion is easily countered.

Petitioner is a first-time offender, while all but one of the Court's decisions relied on by the Government involved recidivists. *See Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Rummel v. Estelle*, 445 U.S. 263 (1980); *Davis*, 454 U.S. at 380 n.10 (Powell, J., concurring in the judgment). Moreover, the one exception, *Harmelin v. Michigan*, 501 U.S. 957 (1991), is distinguishable. Not only was *Harmelin* a deeply divided decision without a clear majority – producing five separate opinions and a lead opinion that represented the views of only two Members of the Court in 33 of its 36 pages, *see id.* at 961-94 (opinion of Scalia, J., joined by Rehnquist, C.J.) – but the case involved a large amount of an addictive and possibly lethal drug, cocaine, that had "a potential yield of between 32,500 and 65,000 doses." *Id.* at 1002 (Kennedy, J., concurring). There was thus "good reason [to] conclude that [Harmelin's] crime is more serious than the crime in *Davis*," *id.* at 1004 – as well as the crimes in the present case, which involved "small amounts of marijuana" worth a few hundred dollars. Pet. App. 90. Petitioner's offense does not compare to the crime in *Harmelin*.[8]

[8] It might be noted that marijuana has been decriminalized in a number of jurisdictions and is deemed a minor offense in others. *See, e.g.*, COLO. REV. STAT. § 18-18-406(1) (making possession of less than one ounce of marijuana a petty offense subject to $100 fine); 22 ME. REV. STAT. § 2383(1)(A) (making

(Continued on following page)

In addition, each of the lower court cases cited in the response involved armed robberies. Br. in Opp. 16 (citing *United States v. Hungerford*, No. 05-30500, 2006 WL 2923703 (9th Cir. Oct. 13, 2006); *United States v. Beverly*, 369 F.3d 516 (6th Cir. 2004); *United States v. Arrington*, 159 F.3d 1069 (7th Cir. 1998); *United States v. Harris*, 154 F.3d 1082 (9th Cir. 1998). Armed robberies are "extremely dangerous" and "undeniably violent" crimes where harm is threatened and occasionally caused. *Harris*, 154 F.3d at 1084. These are simply not applicable to Petitioner's case. Ironically, however, the Government's general point – that the courts have "rejected Eighth Amendment challenges to lengthy prison sentences," Br. in Opp. 16 – provides a strong reason for this Court to grant the petition in the present case. Some lower courts now misunderstand the Supreme Court's Eighth Amendment jurisprudence as standing for the proposition that a term of imprisonment can *never* be unconstitutional.[9]

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possession of usable amount of marijuana a civil violation subject to fine of $350-$600); NEB. REV. STAT. § 28-416(13)(a) (making possession of less than one ounce of marijuana an infraction subject to a citation); N.Y. PENAL LAW § 221.05 (making possession of up to 25 grams of marijuana a civil violation subject to a $100 fine). Moreover, the federal government itself treats marijuana as less harmful than cocaine and other more serious drugs under congressional statutes and the Sentencing Guidelines. *Compare* 21 U.S.C. § 841(b)(1)(A)-(C) (punishment for, *inter alia*, heroin and cocaine) *with* 21 U.S.C. § 841(b)(1)(D) (punishment for marijuana). "Although drug crimes generally are considered serious," a federal appellate court argued in 2001, "we believe that it denies reality and contradicts precedent to say that all drug crimes are of equal seriousness and pose the same threat to society." *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001).

[9] *See, e.g., Beverly*, 369 F.3d at 537 ("The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment. *See Harmelin*, 501 U.S. at 996. In the absence of such guidance, we see no principle on which such a result could be based, and we decline to establish such a principle here."); *Hungerford*, 2006 WL 2923703, at n.4 (Reinhardt, J., concurring) ("We are foreclosed from holding the sentence to be in violation of the cruel and unusual punishment clause because of its severity by *Harmelin* and *Ewing*"); *Harris*, 154 F.3d at 1085-86 (Noonan, J., concurring) ("In the present climate, Congress's attempt to control crime by escalating the punishments has gone very far in the direction of eliminating the prudential, proportionate judgment of the

(Continued on following page)

As stated by a Member of the Court and reiterated by a lower court, "[i]n too many cases, mandatory minimum sentences are unwise and unjust." *Hungerford*, 2006 WL 2923703, at *7 (Reinhardt, J., concurring) (quoting Hon. Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003)). This is precisely the situation here – an "unjust, cruel, and even irrational" sentence, Pet. App. 33, 102 – resulting in an extraordinary case of grossly disproportionate punishment, *see* Pet. 27-29; Pet. App. 63-69 (noting far lower sentences for far more severe crimes); that, but for the Court's decision in *Davis*, would have been deemed unconstitutional. Given the uncertain status of summary dispositions by *per curiam* opinion, as illustrated by *Davis* and its application in the present case, and the confusion over proper Eighth Amendment analysis, echoed by Amici Curiae, this case offers an excellent vehicle to clarify the law and provide guidance to the lower courts.

* * *

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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sentencing judge. The effect has been magnified by the deference accorded the legislature by the decisions of the Supreme Court.").

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No. 06-26

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

WELDON ANGELOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE 145 INDIVIDUALS, INCLUDING FORMER UNITED STATES ATTORNEYS GENERAL, RETIRED UNITED STATES CIRCUIT COURT JUDGES, RETIRED UNITED STATES DISTRICT JUDGES, FORMER UNITED STATES ATTORNEYS AND OTHER FORMER HIGH RANKING UNITED STATES DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE [1]

Amici Curiae are a group of 145 individuals, including former United States Attorneys General, retired United States Circuit Court Judges, retired United States District Judges, former United States Attorneys and other former high ranking United States Department of Justice officials, who together have hundreds of years of expertise in federal criminal law and federal sentencing issues.[2] Based on that collective experience, and on what we view as a cruel, unjust and even irrational 55-year mandatory minimum prison sentence — which was the finding of the very court that imposed the sentence — Amici respectfully urge the Court to grant Petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

Weldon Angelos is a first-time offender who, at the age of 24, was convicted of sixteen counts after trial by jury, including three counts under Title 18 U.S.C. § 924(c).[3] Two of these three counts (counts two and four of the indictment) charged that Mr. Angelos on two occasions possessed a pistol during the sale of $350 worth of marijuana to a government informant. Pet. App. 34-35. The third count (count ten of the indictment) charged

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1. No counsel for a party authored this brief in whole or in part. No party has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this amicus brief; their letters of consent have been submitted herewith, pursuant to Supreme Court Rule 37.2(a).

2. A list of the Amici Curiae is set forth in the Appendix hereto at App. 1.

3. In connection with "all offenses other than the § 924(c) counts," the District Court sentenced Mr. Angelos to one day of imprisonment. Pet. App. 95-96.

Mr. Angelos with possessing firearms which he owned in his residence and used for recreational activities. *Id.* at 90. Mr. Angelos was not convicted of using, threatening to use, or even displaying these firearms. For his mere possession of the firearms in the course of the sale of small amounts of marijuana, Mr. Angelos will essentially spend the rest of his life in prison.

Applying the analysis set forth in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the District Court (Paul G. Cassell, United States District Judge) concluded that the sentence of 55 years was "cruel, unjust, and even irrational" (Pet. App. 33, 102), and that it was grossly disproportionate to the punishment that would be imposed for far more serious and violent crimes — crimes such as aircraft hijacking, second degree murder, espionage, kidnapping, and aggravated assault. *Id.* Despite the fact that Judge Cassell concluded that under the *Harmelin* test "Mr. Angelos' sentence violates the Eighth Amendment" (Pet. App. 92-93), he reluctantly concluded that he was obligated to apply this Court's *per curiam* holding in *Hutto v. Davis*, 454 U.S. 370 (1982) and uphold the sentence: ". . . an additional 55-year sentence for Mr. Angelos under § 924(c) is unjust, disproportionate to his offense, demeaning to victims of actual criminal violence — but nonetheless constitutional." Pet. App. 97.

In a unique effort to find a remedy for what it called "one of those rare cases where the system has malfunctioned" (Pet. App. 97), the District Court called upon the President of the United States to commute Mr. Angelos' sentence to no more than 18 years in prison (Pet. App. 34), and upon Congress to modify § 924(c) so that its harsh provisions for 25-year multiple

sentences apply only to true recidivist drug offenders. Pet. App. 34, 102.[4]

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4. By way of background, Judge Cassell was appointed to the United States District Court for the District of Utah by President George W. Bush in 2002. Judge Cassell's profile and credentials are available at *http://www.utd.uscourts.gov/judges/cassell.html*. Judge Cassell clerked for then Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia and Chief Justice Warren Burger, before serving as an Associate Deputy Attorney General and an Assistant United States Attorney for the Eastern District of Virginia from 1984 to 1991. *Id.* Before his appointment to the District Court, Judge Cassell was a law professor at the University of Utah College of Law and one of the nation's leading proponents of the death penalty, *see, e.g.*, *Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case* (H. Bedau & P. Cassell eds. 2004); Stephen J. Markman and Paul G. Cassell, *Protecting the Innocent, A Response to the Bedau-Radelet Study*, 41 STANFORD L. REV. 121 (1988) (reprinted in part in 136 Cong. Rec. S6648 (May 21, 1990)). Judge Cassell was also one of the nation's leading academic critics of *Miranda v. Arizona*, 384 U.S. 436 (1966). *See http://www.utd.uscourts.gov/judges/cassell.html*. In *Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000) (holding that *Miranda v. Arizona* announced constitutional rule, which Congress may not supersede legislatively, and which the Court, following the rule of *stare decisis*, declined to overrule), this Court invited then Professor Cassell to assist the Court's deliberations by arguing in support of the underlying judgment because no party in the case had argued in favor of 18 U.S.C. § 3501's constitutionality. Following this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), Judge Cassell promptly concluded that the district courts should largely adhere to the sentencing guidelines. *See United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah), *adhered to on denial of reconsideration*, 355 F. Supp. 2d 1269 (D. Utah 2005); *Post-Booker Federal Judicial Sentencing Practices*, testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, Mar. 16, 2006 (Washington, D.C.), available at *http://www.utd.uscourts.gov/judges/cassell_final.pdf*.

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the sentence. Pet. App. 3. The Court of Appeals rejected the District Court's finding that the 55-year sentence was grossly disproportionate and, substituting its own findings for those of the District Court, which presided over the trial and sentencing proceedings, held that the District Court erroneously downplayed the seriousness of Mr. Angelos' crimes. *Id.* at 26.[5]

Amici submit that the District Court was right in finding the sentence "cruel, unjust and irrational" and support Petitioner's claim that the District Court and the Court of Appeals erred in refusing to hold that the sentence was unconstitutional in light of *Hutto v. Davis*. We agree with Petitioner's claim that the uncertain status of *Davis*, which we too contend is no longer good law, confuses this Court's otherwise clear guidance regarding the proper analysis of Eighth Amendment claims and that it caused the District Court below erroneously to conclude that it could not declare the sentence in this case to be unconstitutional.

We contend further that the District Court erred in leaving Mr. Angelos to the mercy of the executive or legislative branches and that the District Court and the Court of Appeals should have concluded that the application of § 924(c) in this case is unconstitutional under the Eighth Amendment because the resulting 55-year sentence is contrary to evolving standards of decency which are the hallmark of civilized society. As this Court recognized almost a century ago, the Eighth Amendment "may be . . . progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice." *Weems v. United States*, 217 U.S. 349, 378

5. As noted in Mr. Angelos' Petition, the Court of Appeals' substitution of its own findings for those of the District Court is contrary to established precedent. Pet. 3, n.2.

(1910). The 55-year sentence imposed upon Weldon Angelos provides this Court with the opportunity not only to clarify the questionable status of *Davis*, but to declare that the virtual life sentence imposed upon Petitioner in this case is contrary to our society's evolving standards of decency, fairness and justice and for that reason as well, is unconstitutional.

STATEMENT OF THE FACTS

Amici Curiae adopt the statement of facts set forth in the Petition.

ARGUMENT

MR. ANGELOS' 55-YEAR MANDATORY SENTENCE VIOLATES SOCIETY'S EVOLVING STANDARDS OF DECENCY.

From the enunciation of the Old Testament's principle of an "eye for an eye" and its interpretation that "a fair and equitable relation must exist between the crime and the punishment," *The Pentateuch and Haftorahs*, *Exodus* 21:24; nn. 23-24; Additional Notes at p. 405 (Dr. J.H. Hertz ed., 1979), to the time when Cicero declared "[l]et the punishment match the offense," Marcus Tullius Cicero, *De Legibus*, III, 20, society has demanded that there be a unique proportionality between punishment and the crime triggering the punishment. This Court's Eighth Amendment jurisprudence recognizes that "the right not to be subjected to excessive sanctions" flows from that basic precept of justice — that "punishment for crime should be graduated and proportioned to [the] offense," *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (internal quotations omitted) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Weems*, 217 U.S. at 367), such that "extreme sentences that are 'grossly disproportionate' to the crime" are prohibited by the Eighth Amendment. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' ... against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted). Indeed, the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . [and] the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Recognizing that proportionality determinations are fluid over time, this Court long ago held that the Eighth Amendment "may be . . . progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378. Thus, in interpreting the Eighth Amendment's prohibition against cruel and unusual punishment, the Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 560-61 (quoting *Trop*, 356 U.S. at 101).

Adhering to those clearly-defined standards, the District Court performed an extensive proportionality analysis applying the three factor test outlined in *Harmelin*, and correctly concluded that Mr. Angelos' sentence is "cruel, unjust, and irrational." Pet. App. 33, 102. The District Court made a threshold determination that Mr. Angelos' sentence was grossly disproportionate to the offenses he committed in light of, among other things, Mr. Angelos' status as a first-time offender with no prior adult criminal record, the lack of any use of force or threats of force or violence in connection with the offenses, and the lack of injury or threat of injury to any person or property. *Id.* at 90-91. The District Court also found that Mr. Angelos was punished more harshly than offenders in the same jurisdiction who had been convicted of far more serious crimes and that the sentence to be imposed was excessive. *Id.* at 91-92.

Further, the District Court found that Mr. Angelos' sentence exceeded comparable offenses in other jurisdictions. *Id.* at 63, 92. Despite its finding that the sentence was unconstitutional under the *Harmelin* test, the District Court felt bound by this Court's decision in *Hutto v. Davis* to uphold the sentence. Pet. App. 92-94.

Amici Curiae agree with Petitioner and respectfully suggest that once the *Harmelin* test has been satisfied, the analysis ends, and a finding that a sentence is unconstitutional under *Harmelin* is not inconsistent with *Davis*. Indeed, since this Court decided *Davis* twenty-four years ago, society's standards have changed, so much so that they not only cast doubt on the Court's pronouncement in *Davis*, but also show a significant movement in society's standards. Just as there has been a trend toward abolishing the death penalty for mentally retarded persons, *Atkins*, 536 U.S. at 313-17, and for juveniles under the age of eighteen at the time their crimes were committed, *Roper*, 543 U.S. at 564-68, because such executions constitute cruel and unusual punishment, there has been a similar trend through legislation toward the treatment of marijuana in comparison to other illegal drugs, like cocaine or heroin. *See, e.g.*, 21 U.S.C. § 841.[6]

6. The impact of Mr. Angelos' 55-year sentence on the victims of violent crimes is also reflective of society's evolving standards of decency. As the District Court held, the sentence here is not only unjust and disproportionate, it is "demeaning to victims of actual criminal violence." Pet. App. 97. Under the present statutory scheme, the victims of a terrorist who detonates bombs in public places, passengers on a hijacked plane, the family of a person killed by a second degree murderer, victims of a racist who attacks a minority member with the intent to kill, even a 10-year old rape victim, would see the perpertrators of these brutal crimes sentenced to far less prison time than Mr. Angelos. Pet. App. 66-68. The same standards of decency that have evolved over time to protect victims of violent crimes, as codified by, for example,

(Cont'd)

There has also been a movement seeking to pull back from mandatory minimum sentencing, with the American Bar Association Justice Kennedy Commission having recently issued a report, urging federal and state governments to repeal all mandatory minimum sentences. *See* American Bar Association Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates, dated Aug. 2004, at 26-28; *see also Justice Kennedy Feels His Oats*, Nat'l L.J., July 17, 2006, at 16, col. 3 (reporting on Justice Kennedy's remarks at the Ninth United States Circuit Court of Appeals judicial conference on July 10, 2006; an audio recording of Justice Kennedy's remarks is available in the Office of the Circuit Executive, United States Courts for the Ninth Circuit). The report echoes society's growing sentiment — and Amici's unique experience with federal prosecutions and sentencing issues — that mandatory minimum sentences are simply not the way to reduce crime. *See* Eva S. Nilsen, *Indecent Standards: The Case of U.S. Versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 555-58 (2006) and authorities cited therein.[7]

(Cont'd)

the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Sta. 1248 (codified in scattered sections of 18 U.S.C.), the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.), the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (codified in scattered sections of 8 U.S.C.A., 18 U.S.C.A. and 42 U.S.C.A.), and the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, call for such victims to be protected from the demeaning impact on them of a 55-year sentence for a first time, non-violent marijuana offender like Mr. Angelos.

7. As Petitioner notes in his Petition, Justice Kennedy is not the only member of this Court to have questioned mandatory minimum sentences. Justice Breyer has criticized such sentences as did Chief Justice Rehnquist. Pet. 2, n.1.

The history of *Davis* itself, both before and after this Court's decision in 1982, exemplifies how society's evolving standards of decency breathe life into the Eighth Amendment. In 1979, the Virginia State Legislature recodified its criminal law, reducing the maximum penalty that could be imposed in connection with each of the offenses for which Davis was convicted from 40 years to 10 years because it considered Davis' sentence to be disproportionate. *See* Va. Code § 18.2-248.1(a)(2) (Supp. 1981); § 18.2-10(e) (1975); *Davis*, 454 U.S. at 386 (Brennan, J., dissenting) (although "[t]his legislative reappraisal of criminal punishment for marijuana offenses does not necessarily render unconstitutional [Davis'] substantially longer term . . . it plainly confirms the views of the courts below, which I share, that the punishment inflicted on Davis is unconstitutionally disproportionate and unsupported by any considered legislative judgment that the punishment inflicted is appropriate for the offenses committed"). Following this Court's decision in *Davis*, then-Virginia Governor Charles Robb granted a pardon to Davis, relieving him of any unserved portion of his 40 year sentence, which exceeded a total of 20 years. *See* List of Pardons, Commutations, Reprieves and Other Forms of Clemency, January 15, 1982 to January 17, 1983 Reported to The Governor and the General Assembly of Virginia. This is yet another example of the extent to which society's standards have changed — vis-à-vis *Davis* — since its pronouncement by this Court. In Mr. Angelos' case, however, the purpose of the cruel and unusual provision of the Eighth Amendment is to prohibit an unconstitutional sentence and not to leave a criminal defendant like Mr. Angelos to the mercy of the legislative or executive branches.

While the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," *Atkins*, 536 U.S. at 312 (citation omitted), "it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." *Gregg v. Georgia*, 428 U.S. 153, 174 n.19 (1976) (citations omitted). "[P]roportionality review by federal courts should be informed by 'objective factors to the maximum extent possible.'" *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)). Thus, another effective way of determining society's standards of decency and what comports with such standards is by learning from the individuals comprising that society, or the jurors from a particular case. The jury is a "significant and reliable objective index of contemporary values," *Gregg*, 428 U.S. at 181, and its behavior is a "highly relevant" indicator of a society's evolving standards. *See Coker v. Georgia*, 433 U.S. 584, 604 n.2 (1977) (Powell, J., concurring in part, dissenting in part). Jurors necessarily represent a fair cross section of a society's population, reflecting public attitude and responding to changed social conditions.

The District Court here acknowledged as much. Following Mr. Angelos' trial, the District Court contacted the jurors and, over the government's objection, sent each of them "the relevant information about Mr. Angelos' limited criminal history, described the abolition of parole in the federal system, and asked the jurors what they believed was the appropriate penalty for Mr. Angelos." Pet. App. 58. Of the twelve former jurors,

> Nine jurors responded and gave the following recommendations: (1) 5 years; (2) 5-7 years; (3) 10 years; (4) 10 years; (5) 15 years; (6) 15 years; (7)

> 15-20 years; (8) 32 years; and (9) 50 years. Averaging these answers, the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years.

Id. The District Court found that "[t]he more the court investigates . . . the more the court finds evidence that the § 924(c) counts here lead to unjust punishment." *Id.* The District Court's gathering of information from jurors is yet another method of promoting the evolution of the Eighth Amendment and further establishes that Mr. Angelos' 55-year mandatory term is not consistent with the standards of decency that mark the progress of a maturing society. *See* Eva S. Nilsen, *Indecent Standards: The Case of U.S. Versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 540-41 (2006) ("Judge Cassell's ambitious approach to the restrictions of mandatory sentences shows that judges can generate valuable data on evolving standards of decency and thereby give content to the Eighth Amendment").

In the final analysis, imposing a 55-year mandatory sentence on a first-time offender like Mr. Angelos does not comport with society's evolving standards, as reflected in jurors' views, the changes in the legal landscape over the last 25 years, the recommendations of judges and Justice Kennedy Commission members with respect to mandatory minimum sentencing or, at bottom, fundamental notions of justice and fairness. As such, Mr. Angelos' mandatory minimum sentence violates the Eighth Amendment's guarantee against cruel and unusual punishment that is informed by the evolving standards of decency in a civilized society. Amici Curiae respectfully maintain that, because a mandatory minimum punishment of 55-years in Mr. Angelos' case is incompatible with these standards, the punishment cannot withstand constitutional scrutiny.

CONCLUSION

Amici Curiae respectfully request the Court to grant Mr. Angelos' petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX — LIST OF AMICI CURIAE

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